TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 295.

THE NORTHERN PACIFIC RAILROAD COMPANY AND THOMAS F. OAKES, HENRY C. PAYNE, AND HENRY C. ROUSE, RECEIVERS OF THE NORTHERN PACIFIC RAILROAD COMPANY, PLAINTIFFS IN ERROR,

vs.

NARCISSE POIRIER.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED JUNE 29, 1895.

(15,941.)

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a *Transcript of Record.*

United States Circuit Court of Appeals for the Ninth Judicial Circuit, January Term, 1894.

NORTHERN PACIFIC RAILROAD Co. and THOMAS F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad, Plaintiffs in Error,
vs.
NARCISSE POIRIER, Defendant in Error.
} No. 185.

Error to the circuit court of the United States for the district of Washington, eastern division.

Endorsed: Filed Oct. 2, 1894. F. D. Monckton, clerk.

1 Be it remembered, that on the 28th day of March, 1893, there was duly filed in said circuit court of the United States for the district of Washington, eastern division, a transcript from the superior court of Spokane county, Washington, in words and figures as follows, to wit:

In the Superior Court in and for Spokane County, Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane & Palouse Railway Company (a Corporation), Defendants.

The plaintiff complains and alleges:

I.

That on the seventh day of October, 1892, the defendant The Northern Pacific Railroad Company was a corporation organized and existing under the laws of the United States and at said time was engaged in operating a line of railway extending from Marshall in the State of Washington, to Kendrick in the State of Idaho, and that the said line of railway passed through and across the county of Spokane in said State of Washington. That said North-
2 ern Pacific Railroad Company was not at said time the owner of said line of railway, but was simply the lessee thereof. That said line of road was at said time owned and controlled by said Spokane and Palouse Railway Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Spokane in said State. That said Spokane and Palouse Railway Company as the owner of said line of railway was jointly interested in the operation thereof with the said Northern Pacific Railroad Company at the date above men-

tioned, and that the said two defendant companies were jointly guilty of the negligence and responsible for the damages to plaintiff hereinafter set forth in this complaint.

II.

That on the said seventh day of October, 1892, this plaintiff while in the employ of said defendant, The Northern Pacific Railroad Company, and acting in the capacity of middle brakeman upon one of said defendant's trains of cars which was passing over a portion of defendant's said leased road between Vollmer and Kendrick, in the State of Idaho, and when within about five miles of Kendrick, through the carelessness and negligence of the defendant The Northern Pacific Railroad Company was injured as follows, to wit: He received blows upon the head producing violent concussion of the brain and brain lesions, permanently injuring the head and brain so that he is permanently injured mentally and physically so as to be entirely and permanently incapacitated and disabled and rendered unable to perform any work or labor or to attend to any
3 business whatever; injuring also his eyes and ears, greatly impairing and injuring his eyesight and causing him to become partially deaf.

III.

That at the time plaintiff received the injuries mentioned as aforesaid he was standing upon the rear end of a flat car about midway of said train (which said train hereinafter in this complaint is called and designated the first train) and attempting to uncouple said flat car from a box car immediately back of said flat car; that while so engaged and attempting to uncouple said cars, the defendant The Northern Pacific Railroad Company carelessly, negligently and unskilfully while operating and running another train over said leased road (which said train hereinafter in this complaint is called and designated the second train), in the same direction and upon the same track as the said first train upon which plaintiff was standing, ran said second train against and into the said first train upon which plaintiff was standing by striking the said first train at the rear thereof with the locomotive attached to said second train, causing the said box car immediately behind the flat car upon which plaintiff was standing upon said first train, to strike plaintiff upon the head with great violence, knocking him off of said flat car and with great violence throwing him upon the ground and rocks at the side of said flat car and away from said flat car a distance of about nine feet.

IV.

That the plaintiff while standing and working upon said flat car was acting in all things under the orders of this de-
4 fendant, The Northern Pacific Railroad Company and was in all things performing the work required by him to be performed and acting in accordance with the orders of said defend-

ant. That said first train was standing upon said track in accordance with the orders of said defendant, requiring said train to be there at said time, and that said second train ran against and into said first train solely through the negligence, carelessness and unskilful management and operation of said second train by said defendant and not otherwise.

V.

That by reason of the premises aforesaid, the defendant was injured as aforesaid and in consequence of said injuries has expended and will incur an indebtedness for medicinal services, medicines, treatment and nursing in the sum of $300.00, and is damaged on account of said injuries in the sum of $25,000.00 (twenty-five thousand dollars). That said injuries and the whole thereof resulted from the negligence of defendants as aforesaid.

Wherefore, plaintiff prays judgment against the said defendants for the sum of $25,300 and for his costs and disbursements herein.

JAMES L. CROTTY AND
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, } ss:
County of Spokane, }

Narcisse Poirier being duly sworn on oath deposes and says: I am the plaintiff above named; I have heard read and know the contents of the foregoing complaint and believe the same to be true.

NARCISSE POIRIER.

Subscribed and sworn to before me this 3d day of December, 1892.

E. B. OLIPHANT,
Notary Public for Washington, Residing at Spokane, Washington.

Filed Dec. 9, 1892.

J. M. ARMSTRONG, *Clerk.*
N. B. BUCKLER, *Deputy.*

THE STATE OF WASHINGTON, } ss:
County of Spokane, }

In the Superior Court for Spokane County, Washington, Held at Spokane.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane and Palouse Railway Company (a Corporation), Defendants.

The State of Washington to the above-named defendant-, Greeting:

You are hereby required to appear in the superior court of Spokane county, State of Washington, held at Spokane, within twenty

days after the day of service of this summons upon you, exclusive of the day of service, if served in the above county; if not
6 served in said county, but in any other county in said State, in thirty days after the day of service, and answer the complaint of the above-named plaintiff now on file in the office of the clerk of said court, a copy of which complaint is herewith delivered to you; and unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in said complaint.

Witness my hand and seal of said court this 9th day of December, 1892.

J. M. ARMSTRONG,
Clerk of said Court,
By N. B. BUCKLER, *Deputy.*

J. L. Crotty and Hyde, Glass & Reagan, attorneys for plaintiff.

Returned and filed this 26th day of January, 1893.

C. O. DOWNING, *Clerk,*
By N. B. BUCKLER, *Deputy.*

STATE OF WASHINGTON, } *ss:*
County of Spokane, }

In the Superior Court for Spokane County, Held at Spokane, Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane and Palouse Railway Company (a Corporation), Defendants.

7 STATE OF WASHINGTON, } *ss:*
County of Spokane, }

George Foster, being duly sworn on oath says, I am a citizen of the State of Washington; I am over the age of twenty-one years; I am not the plaintiff in the above-entitled action; I am competent to be a witness at the trial of said action; on the 3d day of January, 1893, I served the annexed summons upon the defendant, The Spokane and Palouse Railway Company, in Spokane county, State of Washington, by delivering to and leaving with A. Tinling, then and there the agent of said defendant, a copy of said summons and a copy of the original complaint in said action; and I served the same upon the defendant, The Northern Pacific Railroad Company at said time and place by delivering a copy thereof and a copy of the original complaint in said action to and leaving the same with A. Tinling, then and there agent of said defendant; each of said copies of said original complaint were duly certified by Jno. J. Reagan, one of the plaintiff's attorneys, to be a true and correct copy of said original complaint, and each of said copies of said summons were duly certified by James L. Crotty, one of plain-

tiff's attorneys, to be a true and correct copy of said original summons hereto attached at the time of said service.

GEORGE FOSTER.

Subscribed and sworn to before me this 26th day of January, 1893.

IKE K. REVELLE,
Notary Public, Washington, Residing at Spokane, Washington.

8 In the Superior Court of the County of Spokane, State of Washington.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and SPOKANE & PALOUSE RAILROAD COMPANY, Defendants. } No. 5859.

Petition for Removal of Case to U. S. Circuit Court.

To the honorable judge of the superior court of the county of Spokane, State of Washington:

Your petitioner, The Northern Pacific Railroad Company, one of the defendants in the above-entitled action, respectfully alleges:

First. That your petitioner is a corporation created, organized and existing under and by virtue of an act of the Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound on the Pacific coast by the northern route." Approved July 2d, 1864.

Second. That this action was commenced in the superior court of the State of Washington holding terms at Spokane in and for the county of Spokane and is there now pending.

Third. That your petitioner, The Northern Pacific Railroad Company, is not a citizen of the State of Washington, nor has it been such citizen at any time since the commencement of this
9 action. That said plaintiff is now, and ever has been since the commencement of this action, a citizen of the State of Washington.

Fourth. That this action brings before this court a controversy arising between citizens of different States.

Fifth. That this is a suit of a civil nature arising under the laws of the United States; that the same is now pending in a State court, and is properly within the jurisdiction of the circuit court of the United States for the ninth judicial circuit, district of Washington.

Sixth. That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

Wherefore your petitioner prays, that an order may be entered in this court removing this action into the circuit court of the

United States for the ninth judicial circuit, district of Washington, together with all files and records relating thereto, for proceeding in said action before that court.

NORTHERN PACIFIC RAILROAD CO.,
By G. G. CHANDLER, *Its General Agent.*

STATE OF WASHINGTON, }
County of Pierce, } *ss:*

G. G. Chandler, being first duly sworn upon oath deposes and says, that he is the general agent of the Northern Pacific Railroad Company, the petitioner herein; that he has read the foregoing petition; knows the contents thereof and believes the same to be true.

G. G. CHANDLER.

10 Subscribed and sworn to before me this 6th day of January, 1893.

E. R. YORK,
Notary Public, Residing at Tacoma, Wash.

Due service of within petition and notice by receipt of a true copy thereof admitted this 10th day of January, 1893.

JAMES L. CROTTY AND
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

Filed Jan'y 10, 1893.

C. O. DOWNING, *Clerk.*
N. B. BUCKLER, *Deputy.*

In the Superior Court of the County of Spokane, State of Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY and SPOKANE & PALOUSE RAILROAD COMPANY, Defendants. } No. 5859.

Supplemental Petition for Removal of Case to United States Circuit Court.

To the honorable judge of the superior court of the county of Spokane, State of Washington:

Your petitioner The Northern Pacific Railroad Company one of the defendants in the above-entitled action, respectfully alleges:

11 First. That your petitioner is a corporation created, organized and existing under and by virtue of an act of Congress of the United States, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget sound, on the Pacific coast by the northern route." Approved July 2nd, 1864.

Second. That this action was commenced in the superior court of the State of Washington, holding terms at Spokane, in and for the county of Spokane, and is there now pending.

Third. That your petitioner, The Northern Pacific Railroad Company, is not a citizen of the State of Washington, nor has it been such citizen at any time since the commencement of this action; that said plaintiff was at the time of the commencement of this action, and ever since has been and now is a citizen of the State of Washington.

Fourth. That this action brings before this court a controversy arising between citizens of different States.

Fifth. That this — a suit of a civil nature arising under the laws of the United States, and the same is now pending in a State court, and is properly within the jurisdiction of the circuit court of the United States for the ninth judicial circuit, district of Washington, eastern division.

Sixth. That the matter in dispute in this action exceeds, exclusive of all interest and costs, the sum or value of two thousand dollars.

12 Seventh. That at the time of the injury to plaintiff, as alleged in the complaint, the defendant, The Northern Pacific Railroad Company was, and ever since has been, and for a long time prior thereto had been in the sole and exclusive possession of the railroad of the Spokane & Palouse Railroad Company, and was operating the same under a lease from the Spokane & Palouse Railroad Company, and that the said Spokane & Palouse Railroad Company was not in any manner interested in or party to the operation of said railroad; that the trains mentioned in plaintiff's complaint were exclusively the property of the defendant, The Northern Pacific Railroad Company, and were being exclusively operated by the employees of said defendant, The Northern Pacific Railroad Company; and that for the above reasons the defendant, The Spokane & Palouse Railroad Company, is not a necessary or proper party defendant in this action; and your petitioner further represents upon information and belief, that said defendant, The Spokane & Palouse Railroad Company was not made defendant herein in good faith, but was made such defendant for the sole purpose of endeavoring to prevent this cause from being removed to the circuit court of the United States.

Eighth. And your petitioner offers herewith good and sufficient surety for its entering in the circuit court of the United States for the district of Washington, eastern division, on the first day of the next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

13 Wherefore your petitioner prays this honorable court to proceed no further herein, except to make an order of removal required by law, and to accept said surety and bond, and to cause the record herein to be removed to the said circuit court of the

United States in and for the district of Washington, eastern division, and it will ever pray.

ASHTON & CHAPMAN AND
McBRIDE & ALLEN,
Attorneys for Petitioner.

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, Albert Allen, being duly sworn, do say that I am a member of the firm of McBride & Allen, the attorneys for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

ALBERT ALLEN.

Subscribed by the said Albert Allen in my presence and by him sworn to before me this 10th day of January, A. D. 1893.

A. REEVES AYRES,
Clerk U. S. Circuit Court for the Dist. of Wash.,
By A. H. KENYON, *Deputy.*

Due service hereof admitted this 10th day of January, 1893.

JAMES L. CROTTY AND
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

14 Filed Jan. 10, 1893.

C. O. DOWNING, *Clerk.*
N. B. BUCKLER, *Deputy.*

In the Superior Court, County of Spokane, State of Washington.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and SPOKANE & PALOUSE RAILROAD COMPANY, Defendants. } No. 5859.

Notice.

To Narcisse Poirier, plaintiff, and to James L. Crotty and Hyde, Glass & Reagan, his attorneys:

You and each of you are hereby notified that there has been this day filed in the above-entitled action in the office of the clerk of the above-entitled court, a petition and supplemental petition, a copy of which is hereunto attached, for the removal of said cause to the circuit court of the United States for the ninth judicial circuit, district of Washington, and that the defendant proposes to remove the above-entitled action in accordance with said request, having this day filed with said request, a bond conditioned as required by law with good and sufficient sureties in the sum of five hundred dollars.

Dated January —, 1893.

ASHTON & CHAPMAN AND
McBRIDE & ALLEN,
Attorneys for Defendant.

15 Filed Jan. 10, 1893.

C. O. DOWNING, *Clerk.*
N. B. BUCKLER, *Deputy.*

In the Superior Court of the County of Spokane, State of Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY and SPOKANE & PALOUSE RAILWAY COMPANY, Defendants. } No. 5859.

Bond.

Know all men by these presents: That we, The Northern Pacific Railroad Company, one of the defendants in the entitled action, as principal, and Isaac W. Anderson and Geo. P. Eaton, residents of Tacoma, State of Washington, as sureties, are held and firmly bound unto Narcisse Poirier, the plaintiff in the above-entitled action, his heirs, executors, administrators and assigns, in the sum of five hundred dollars, lawful money of the United States, for the payment of which well and truly to be made the said Northern Pacific Railroad Company hereby binds itself, and its successors, and we the said sureties hereby bind ourselves and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 6th day of January, 1893.

16 The conditions of the above and foregoing are such that:

Whereas, the said Northern Pacific Railroad Company has filed a petition in the above-entitled court, praying that the above-entitled action, together with a copy of the records relating thereto, may be removed to the circuit court of the United States for the ninth judicial circuit, district of Washington, for further proceedings in said action before that court.

Now therefore, if the said Northern Pacific Railroad Company shall enter in said circuit court of the United States, on the first day of its next session, a copy of the record of the above-entitled suit, and shall pay or cause to be paid all costs that may be awarded by the said circuit court, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise to be and remain in full force and effect

NORTHERN PACIFIC RAILROAD CO.,
By J. M. ASHTON,
Its Counsel, Having Authority by Resolution of its Board of Directors.

ISAAC W. ANDERSON. [SEAL.]
GEO. P. EATON. [SEAL.]

Signed, sealed and delivered in the presence of—
E. R. YORK.
E. A. WOOD.

STATE OF WASHINGTON, } ss:
County of Pierce, }

Isaac W. Anderson and Geo. P. Eaton, the sureties on the
17 above and foregoing bond, being first duly and severally sworn, each for himself, doth depose and say: That he is a resident and freeholder of the county of Pierce, State of Washington, and is worth the sum of five hundred dollars, over and above all just debts and liabilities and exclusive of property exempt from execution.

ISAAC W. ANDERSON.
GEO. P. EATON.

Subscribed and sworn to before me this 6th day of January, 1893.

E. R. YORK,
Notary Public, Residing at Tacoma, Wash.

Filed Jan. 10, 1893.

C. O. DOWNING, *Clerk,*
By N. B. BUCKLER, *Deputy.*

In the Superior Court in and for Spokane County, Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD and THE SPOKANE & PALOUSE RAILWAY COMPANY (Corporations), Defendants.

To the honorable judges of the superior court of the county of Spokane, State of Washington:

Narcisse Poirier, plaintiff in the above-entitled action, in
18 reply to the petition and supplemental petition of the Northern Pacific Railroad Company for the removal of the cause to the United States circuit court respectfully shows:

First. He admits the matters and things and the whole thereof stated in paragraph 1 of petitioner's supplemental petition and in paragraphs 2 and 3 thereof.

Second. He denies the matters and things and the whole thereof set forth and contained in paragraph 4 of said petition.

Third. That as to paragraph 5 of said petition he admits that this suit is of a civil nature and that the same is now pending in a State court, but denies all of the other matters and things in said paragraph contained.

Fourth. He admits the matters and things set forth and contained in paragraph 6 of said petition.

Fifth. That as to the matters and things contained in paragraph 7 of said petition he admits that the Northern Pacific Railroad Company has leased the Spokane and Palouse railway and denies each and every other matter and thing in said paragraph contained.

Sixth. That said Poirier alleges and charges the facts to be that the said Spokane & Palouse Railway Company is a necessary and proper party defendant in this action and that the said railway

company was made a party defendant in this action in good faith and not for the purpose of preventing the removal of this action from the said State court to the circuit court of the United States.

19 That as to said defendant's original petition plaintiff makes the same admissions and denials as in this reply contained as to the supplemental petition.

Wherefore the said plaintiff prays that said action be not removed from the State court to the circuit court of the United States but that the same remain in the State court where it is properly commenced and where it properly belongs.

HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Jno. J. Reagan, being duly sworn on oath deposes and says: I am one of the attorneys for plaintiff in the above-entitled cause; I have heard read and know the contents of the foregoing reply and believe the same to be true.

JNO. J. REAGAN.

Subscribed and sworn to before me this 11th day of January, 1893.

JAMES B. JONES,
Notary Public, Washington, Residing at Spokane, Washington.

Service of above admitted this 11th Jan'y, 1893.

ASHTON & CHAPMAN AND
McBRIDE & ALLEN,
Attorneys for Defendant The Northern Pacific Railroad Company.

Filed Jan. 11, 1893.

C. O. DOWNING, *Clerk.*
W. E. WILLIS, *Deputy.*

20 In the Superior Court in and for the State of Washington, Spokane County, Held at Spokane.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane & Palouse Railway Company (a Corporation), Defendants.

Now on this day this cause coming on to be heard on motion of the plaintiff for default against The Spokane & Palouse Railway Company, one of the defendants herein, said application being made upon the summons and the return thereof in this cause, and it appearing to the court that said summons was duly and regularly served upon said defendant in all respects as required by the laws

of this State, on the 3d day of January, 1893, in the county of Spokane, State of Washington, and that more than twenty days have elapsed since said service was made, and that said defendant has failed to appear, answer or plead herein, and that the time allowed by the laws of this State therefor has expired; and it further appearing to the court that said defendant has defaulted and is in default herein:

Now therefore, it is ordered and adjudged that The Spokane & Palouse Railway Company, one of the defendants herein, the said defendant, is in default herein; and

It is further ordered that said default be entered herein.

21 Done in open court this 26th day of January, 1893, by the court.

JESSE ARTHUR, *Judge.*

C. O. DOWNING, *Clerk.*
N. B. BUCKLER, *Deputy.*

In the Superior Court of the County of Spokane, State of Washington.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and SPOKANE & PALOUSE RAILWAY COMPANY, Defendants. } No. 5859.

Order Removing Cause to the Circuit Court of the U. S.

The petition of The Northern Pacific Railroad Company, one of the above-named defendants, for the removal of this action into the circuit court of the United States, in the ninth judicial circuit for the district of Washington, in pursuance of the laws of the United States relating to the removal of suits from the State courts, having been read and filed, and the security by the said defendant, according to the requirement of such said laws, having been filed, on motion of Ashton & Chapman, attorneys for said defendants, it is—

Ordered, that said security be accepted, and that said action be removed into the circuit court of the United States in the ninth judicial circuit, for the district of Washington, next to be

22 holden in said district of Washington, together with a copy of all files and records relative thereto, for further proceedings therein before the said circuit court; and that in the meantime all further proceedings in said action in this court shall be stayed.

Done in open court on this 20th day of March, 1893.

NORMAN BUCK, *Judge.*

Filed M'ch 20, 1893.

C. O. DOWNING, *Clerk.*

STATE OF WASHINGTON, } ss:
County of Spokane, }

I, C. O. Downing, clerk of the superior court in and for Spokane county, State of Washington, do hereby certify that the foregoing

are true, full and correct transcripts of all the papers, pleadings and entries in the case of Narcisse Poirier *v.* The Northern Pacific R. R. Co. *et al.*, as the same appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and the seal of said superior court this the 27th day of March, A. D. 1893.

[SEAL.] C. O. DOWNING, *Clerk*,
By —— ——, *Deputy*.

This is to certify that I have compared the foregoing and find same to be a correct copy of the original instrument.

H. C. DAVIS.

(Endorsed:) No. 159. Narcisse Poirier *v.* The Northern Pacific Railroad Company. Transcript from superior court. Filed M'ch 23, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy.

23 And afterwards, to wit, on the 28th day of March, 1893, there was duly filed in said court in said cause a demurrer to complaint in words and figures as follows, to wit:

In the Superior Court in and for Spokane County, Washington.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane and Palouse Railway Company (a Corporation), Defendants.

Demurrer.

Now comes The Northern Pacific Railroad Company, one of the defendants in the above-entitled action, and demurs to the complaint of the plaintiff therein, and for cause of demurrer states: That said complaint does not state facts sufficient to constitute cause of action against the said defendant.

ASHTON & CHAPMAN AND
McBRIDE & ALLEN,
Att'y- — Def't Northern Pacific R. R.

I, the undersigned, one of the counsel for the defendant, The Northern Pacific Railroad Company, in the above-entitled action, do hereby certify that, in my opinion the foregoing demurrer is well founded in point of law.

ALBERT ALLEN.

24 (Endorsed:) No. 159. In the circuit court, U. S. dist. of Washington. Narcisse Poirier, plaintiff, *vs.* The Northern Pacific Railroad Company *et al.*, defendant-. Demurrer to complaint. Filed M'ch 28, 1893. A. Reeves Ayres, clerk, by A. H. Kenyon, deputy. Due service of the within demurrer by a true copy thereof, is hereby accepted, at Spokane, Wash., this 28th day of March, A. D. 1893. S. C. Hyde, attorney for pl'ff.

And afterwards, to wit: on the 4th day of April, 1893, the same being the first judicial day of the regular April term of said court, present the Honorable Cornelius H. Hanford, United States district judge presiding, the following proceedings were had in said cause, to wit:

In the United States Circuit Court for the District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

APRIL 4TH.

And now, on this day, this cause came on for hearing upon the demurrer of the defendant to the complaint; and thereupon the same was argued by respective counsel; and the court, being fully advised in the premises, it is ordered that the said demurrer be, and the same is hereby, overruled, to which ruling the defendant excepts, and its exception is allowed.

25 And on motion of the defendant, it is ordered that the plaintiff furnish a bill of particulars in said cause, and the defendant is allowed ten days after the filing of such bill of particulars in which to file its answer.

Law Book, page 100.

(Endorsed:) In the United States circuit court for the district of Washington, eastern division. Narcisse Poirier, plaintiff, *vs.* The Northern Pacific Railroad Company, defendant. Law Book, page 100. Filed April 4, 1893. A. Reeves Ayres. James O'Neill.

And afterwards, to wit: on the 15th day of April, 1893, there was duly filed in said court in said cause an answer, in words and figures as follows, to wit:

In the U. S. Circuit Court, Ninth Judicial Circuit, District of Washington, Eastern Division, Terms at Spokane.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant.

Answer.

Comes now the Northern Pacific Railroad Company, the defendant, and for answer to the complaint of the plaintiff, says:

I.

It admits that on the 7th day of October, 1892, it was a corporation organized and existing under the laws of the United States,

and at said time was engaged in operating a line of railway
26 extending from Marshall, in the State of Washington, to Kendrick, in the State of Idaho, and that said line of railway passed through and across the county of Spokane, in said State of Washington, which line of railway it had theretofore leased from the owner thereof, the Spokane & Palouse Railway Company, a corporation organized and existing under the laws of the Territory (now State) of Washington, but denies each and every allegation of the first paragraph of plaintiff's said complaint, except as herein specifically admitted.

II.

It denies the second paragraph of said complaint, and each and every allegation thereof, except that the plaintiff on the 7th day of October, 1892, was in the employ of this defendant in the capacity of a brakeman upon one of its trains and met with some injury, but alleges that said injuries sustained were received without any fault or negligence on its part.

That defendant has not sufficient knowledge or information to form a belief as to the nature, character and extent of plaintiff's injuries and therefore denies all the allegations of plaintiff's complaint relative thereto; denies that said injuries are or will be permanent, and denies that any disability now exists, or will exist by reason of said injuries.

III.

Denies the third paragraph of said complaint and each and every allegation therein contained.

IV.

Denies the fourth paragraph of said complaint and every allegation therein contained.

27 V.

Denies the fifth paragraph of said complaint, and each and every allegation therein contained, and denies that the plaintiff has been damaged in the sum of twenty-five thousand dollars, or in any sum whatever or at all.

VI.

Denies each and every allegation contained in said complaint not herein specifically admitted.

Defendant for a further and affirmative defence, alleges and avers, that whatever injuries were sustained, or received by, or occasioned to said plaintiff, the same were received, sustained by and accrued to him through and by reason of his own carelessness and negligence, and the carelessness and negligence of his fellow-servants and colaborers, working the same line or class of employment with said plaintiff and without any fault or negligence on the part of the said defendant or any of its servants, agents or employés for whose acts defendant is responsible to plaintiff, and the carelessness of

said plaintiff and that of his fellow-employés, contributed to the receiving and sustaining of said injuries by said plaintiff.

Wherefore the defendant prays that it may go hence without day and recover its costs and expenses in this action.

ASHTON & CHAPMAN AND
McBRIDE & ALLEN,
Attorneys for Defendant.

28 STATE OF WASHINGTON, } ss:
County of Spokane, }

A. Tinling, being first duly sworn, on oath deposes and says: That he is the agent of The Northern Pacific Railroad Company, the defendant in the above-entitled action; that he has read the foregoing answer, and that he believes the same to be true.

A. TINLING.

Subscribed and sworn to before me this 15th day of April, 1893.

A. REEVES AYRES,
Clerk U. S. Circuit Court.

(Endorsed:) No. 159. In the United States circuit court, district of Washington, eastern division. Narcisse Poirier, plaintiff, *v.* Northern Pacific Railroad Company, defendant. Answer. Due service of within answer by receipt of a true copy thereof admitted this 15th day of April, '93. Hyde, Glass & Reagan and J. L. Crotty, attorneys for plaintiff. Filed April 15th, 1893. A. Reeves Ayres, clerk. Ashton & Chapman, attorneys for defendant; office, room 17, N. P. R. R. Headquarters building, Tacoma.

And afterwards, to wit: on the 11th day of September, 1893, the same being the sixth judicial day of the regular September term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

29 NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

MONDAY, *September 11th.*

And now, on this day, on the application of the attorneys for the plaintiff, it is ordered that Thomas F. Oakes, Henry C. Payne and Henry C. Rouse the receivers of said defendant be, and they are, hereby, made parties defendant to this action, and this cause is set for trial September 20th.

(Endorsed:) Narcisse Poirier *v.* N. P. R'road. Filed Sept. 11, '93. A. Reeves Ayres. James O'Neill.

And afterwards, to wit: on the 21st day of September, 1893, there was duly filed in said court, in said cause, an amended complaint, in words and figures as follows, to wit:

In the Circuit Court of the United States, Ninth Circuit, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY (a Corporation) and Spokane and Palouse Railway Company (a Corporation), Defendants.

30 Plaintiff for amended complaint alleges:

I.

That on the 7th day of October, 1892, the defendant The Northern Pacific Railroad Company was a corporation organized and existing under the laws of the United States and at said time was engaged in operating a line of railway, extending from Marshall in the State of Washington to Kendrick in the State of Idaho and said line of railway passed through and across the county of Spokane in the State of Washington. That said Northern Pacific Railroad Company was not at said time the owner of said line of railway, but was simply the lessee thereof. That said line of road was at said time owned and controlled by said Spokane and Palouse Railway Company, a corporation organized and existing under the laws of the State of Washington with its principal place of business at Spokane in said State. That said Spokane and Palouse Railway Company as the owner of said line of railway was jointly interested in the operation thereof with the said Northern Pacific Railroad Company at the date above mentioned, and that the said two defendant companies were jointly guilty of the negligence and responsible for the damages to plaintiff hereinafter set forth in this complaint.

II.

That on the said seventh day of October, 1892, this plaintiff while in the employ of said defendant, The Northern Pacific Railroad Company, and acting in the capacity of middle brakeman
31 upon one of said defendant's trains of cars which was passing over a portion of defendant's said leased road between Vollmer and Kendrick, in the State of Idaho, and when within about five miles of Kendrick, through the carelessness and negligence of the defendant, The Northern Pacific Railroad Company, was injured as follows, to wit: He received blows upon the head and back producing violent concussions of the brain and brain lesions, permanently injuring the head and brain so that he is permanently injured mentally and physically so as to be entirely and permanently incapacitated and disabled and rendered unable to perform any work or labor or to attend to any business whatever; injuring

also his eyes and ears, greatly impairing and injuring his eyesight and causing him to become partially deaf. That by reason of said cuts, blows, bruises and injuries the plaintiff has suffered great pain and distress both physical and mental, that he has been sick and sore and has lost the control of his muscles and limbs and has become greatly emaciated and wholly unable to perform any work or labor.

III.

That at the time plaintiff received the injuries mentioned as aforesaid he was standing upon the rear end of a flat car about midway of said train which said train hereinafter in this complaint is called and designated the first train and attempting to uncouple said flat car from a box car immediately back of said flat car; that while so engaged and attempting to uncouple said cars, the defendant The Northern Pacific Railroad Company carelessly, negligently
32 and unskilfully while operating and running another train over said leased road which said train hereinafter in this complaint is called and designated the second train, in the same direction and upon the same track as the first train upon which plaintiff was standing, ran said second train against and into said first train upon which plaintiff was standing by striking said first train at the rear thereof with the locomotive attached to said second train, causing said box car immediately behind said flat car upon which plaintiff was standing upon said first train, to strike plaintiff upon the head with great violence, knocking him off of said flat car and with great violence throwing him upon the ground and rocks at the side of said flat car and away from said flat car a distance of about nine feet.

IV.

That the plaintiff while standing and working upon said flat car was acting in all things under the orders of the defendant, The Northern Pacific Railroad Company, and was in all things performing the work by him required to be performed and acting in accordance with the orders of said defendant, and in all things used due and proper care and diligence and was himself without fault. That said first train was standing upon said track in accordance with the orders of said defendant requiring said train to be there at said time. That said defendant The Northern Pacific Railroad Company was guilty of carelessness and negligence in this, that the conductor of said first train well knew that said second train was following said first train, and failed to leave
33 a flagman in the rear of said first train before and at the time said first train stopped at said place, to hold and stop said second train, as he was in duty bound to do. That the place where said collision occurred was on a mountain grade, and the said defendant The Northern Pacific Railroad Company *were* guilty of carelessness and negligence in allowing said second train to follow the first train closely and was guilty of carelessness and negligence in running said second train into said first train whereby this plaintiff was injured as aforesaid.

V.

That prior to said accident plaintiff was an able-bodied man, strong and healthy and had twelve years' experience in railroad train work and was able to and did earn the average wages of $75 per month and was earning the wages of $75 per month at the time of his said injuries.

Plaintiff further alleges that heretofore, to wit: on the 17th day of August, 1893, Thomas F. Oakes, and Henry C. Rouse and Henry C. Paine were duly appointed receivers for the defendant, The Northern Pacific Railroad Company, by this our said court, and are now in possession of the property of said defendant. Wherefore plaintiff asks that they may be made defendants in this action.

VI.

That by reason of the premises aforesaid the plaintiff was injured as aforesaid and in consequence of said injuries has expended and will incur an indebtedness for medical services, medi-
34 cines, treatment and nursing in the sum of $300.00, and is damaged on account of said injuries in the sum of $25,000 (twenty-five thousand dollars). That said injuries and the whole thereof resulted from the negligence of the defendants aforesaid.

Wherefore plaintiff prays judgment against said defendants for the sum of $25,300 and for his costs and disbursements herein.

JAMES L. CROTTY AND
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

Narcisse Poirier, being first duly sworn on oath says: I have heard read and know the contents of the foregoing amended complaint and believe the same to be true.

NARCISSE POIRIER.

Subscribed and sworn to before me this 21st day of September, 1893.

S. C. HYDE,
Notary Public, Washington, Residing at Spokane, Washington.

(Endorsement No. 1:) No. —. Narcisse Poirier, plaintiff, *vs.* The Northern Pacific Railroad Company *et* ux., defendants. Amended complaint.

(Endorsement No. 2:) No. 159. In United States circuit court, district of Washington, eastern division. Narcisse Poirier, plaintiff, *vs.* Northern Pacific Railroad Co., defendant. Amended complaint. Filed Sept. 21, 1893. —— ——, clerk. Hyde, Glass &
35 Reagan, attorneys for pl'ffs; office, room No. —, Hyde building, Tacoma.

And afterwards, to wit: on the 21st day of September, 1893, there was duly filed in said court, in said cause, motion on affidavit, in words and figures as follows, to wit:

U. S. Circuit Court, Ninth Circuit, Dist. Washington, E. Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD *et al.*, Defendants.

To Messrs. McBride & Allen, attorneys for said defendants:

Please take notice that at the trial of this action the plaintiff will ask leave to amend the complaint instanter and herewith submits a copy of his proposed amended complaint.

The plaintiff will at the same time offer and consent that the answer of the defendants now on file may stand and be regarded as a full and sufficient answer to this proposed amended complaint, or will consent and offer that the defendants may file an answer at any time during the trial or at the close of the trial to complete the issues in this action.

JAMES L. CROTTY,
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

36 U. S. Circuit Court, Ninth Circuit, Dist. Washington, E. Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Defendants.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

S. C. Hyde, being first duly sworn, on oath deposes and says: That he is one of the attorneys for the plaintiff in the above-entitled action; affiant further says that the plaintiff in this action is and has at all times been in indigent circumstances since the alleged injuries mentioned in the complaint in this action; that affiant as such counsel has been unable to confer with the witnesses who will testify on behalf of the plaintiff until yesterday the 20th of September, 1893; that they reside at some distance from Spokane, and after an examination of the facts in this case and after learning the facts as related by the witnesses for plaintiff, affiant finds that the issues are not properly presented in the original complaint of the plaintiff, and that it is necessary in order to properly present the case of the plaintiff upon its merits that the complaint be amended, and he verily believes that no wrong can result to the defendants by allowing said amendment; that this application for leave to amend is made in good faith, and in the interests of justice.

S. C. HYDE.

37 Subscribed and sworn to before me this 21st day of September, 1893.

A. REEVES AYRES,
Clerk U. S. Circuit Court.

(Endorsed:) No. —. In United States circuit court, district of Washington, eastern division. Narcisse Poirier, plaintiff, *vs.* Northern Pacific Railroad Co., defendant. Motion and affidavit. Filed Sept. 21, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 22d day of September, 1893, there was duly filed in said court, in said cause, an affidavit, in words and figures as follows, to wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Defendants.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

S. C. Hyde, being duly sworn, on oath deposes and says, that he is one of the counsel for the plaintiff in the above-entitled action, and as such has had the management and control of the presentation of the plaintiff's case in this court and the calling of the witnesses. That today and during the trial of this action, and
38 after the defendant had rested its case, affiant's attention was directed to a man by the name of Ressor, in attendance upon the court as affiant is informed, as a witness for the defendant in this action for the purpose of making an inquiry as to a fact to be shown or sought to be shown in rebuttal of the defendants' proofs, and in the brief conversation then had the additional fact was ascertained which is now sought to be put in plaintiff's evidence in this cause; that affiant immediately made inquiries of said Ressor upon the matter which had been called to his attention, and during the conversation discovered that said Ressor could testify to a fact material to the issues in this action, of great importance and very material to plaintiff's cause. That the same relates to the running of the train, designated as the second train in the pleadings in this action, and the management thereof by the defendant; that affiant had no knowledge that such testimony was in existence, or that the said Ressor could give such evidence upon said fact until the time of said conversation; that affiant has never met with said Ressor till said time, and did not know him by sight; that affiant has used all possible diligence to discover all the evidence and facts material to the issues in this cause, proper and necessary to be presented on behalf of the plaintiff, and has devoted his time according to his best diligence and industry to securing the evidence and prepara-

tion and presentation of this cause, since the witnesses began to arrive at this court, and for a period several days before the time set for the trial of this cause down to the present time, and was not able to discover said evidence, or any evidence by which he might
39 establish the fact which he now desires to establish by the said Ressor; that affiant believes and is morally certain that the facts which he will be able to show by said Ressor are material, competent and relevant to the complete presentation of the case of the plaintiff, and that to remove all uncertainty and doubt, the plaintiff ought to be permitted to show said facts. That at the time affiant discovered said evidence, he was taken by surprise by the closing of the defendant's case, and was unable to fully consider the testimony of the said Ressor, and to decide what course to pursue in relation thereto, or to make this application, and that the court adjourned immediately thereafter. Affiant further says that he makes this application in good faith, that the case of the plaintiff may be fairly and fully presented, and he verily believes that it would be in the interests — justice that said case be reopened, and said witness permitted to testify; that counsel for plaintiff were unaware of the existence of this evidence until the time above mentioned. That it will be shown by said witness that he was conductor of said second train, and that he was given no notice that the first train would stop at Clyde Spur. That plaintiff will be able to procure the attendance of said witness to testify tomorrow at the opening of court.

S. C. HYDE.

Subscribed and sworn to before me this 23d day of Sept., 1893.
A. REEVES AYRES, *Clerk.*

In the Circuit Court of the United States, Ninth Circuit, District of Washington, Eastern Division.

40 NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

To Messrs. McBride & Allen, attorneys for the defendant:

Please take notice that at the convening of the court at 8 o'clock p. m. of this day, the plaintiff's counsel will move the court to be allowed to reopen their case, and to call one Ressor, whose first name is unknown to us, to testify in this case on behalf of the plaintiff.

This application will be supported by affidavit, copy of which *are* hereto attached.

Dated Sept. 22d, 1893.

JAMES L. CROTTY AND
HYDE, GLASS & REAGAN,
Attorneys for Plaintiff.

(Endorsed:) Narcisse Poirier *v.* Northern Pacific Railroad Co. Affidavit. Filed Sept. 22d, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 21st day of September, 1893, the same being the fifteenth judicial day of the regular September term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

41 In the Circuit Court of the United States for the District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

THURSDAY, *September 21st.*

And now, on this day, this cause coming on for trial, the said plaintiff appears in open court, in person, and by his attorneys Hyde, Glass & Reagan, and Crotty, Bushnell & Kimble, and the said defendant by its attorneys, McBride & Allen.

And thereupon a jury being called, came and duly answered to their names, and were sworn, to wit:

J. D. Labrie,	John L. Brown,
J. E. Johnson,	Isaac Bridgeman,
George F. Keeling,	I. Brown,
C. C. Randall,	A. R. Thorp,
G. C. Wilson,	J. H. Lamona,
Jacob C. Yenter,	Solomon Herman.

And thereupon, said cause duly proceeded by hearing the evidence until the hour of adjournment, when, by consent of counsel, the jury were admonished, and allowed to separate until the incoming of court tomorrow morning.

(Endorsed:) U. S. circuit court. Narcisse Poirier *v.* Northern Pac. R. R. Co. Trial. Filed Sept. 21, 1893. A. Reeves Ayres, by James O'Neill, dep'y.

42 And afterwards, to wit: on the 22d day of September, 1893, the same being the sixteenth judicial day of the regular September term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD CO., Defendant.

FRIDAY, *Sept. 22d*, 1893.

And now on this 22d day of September, 1893, this cause again coming on for hearing, the jury being called, came and duly answered to their names.

And thereupon John L. Brown, one of the jurors empannelled in this cause, presents to court a request that he may be discharged,

and counsel for the plaintiff and defendant in open court consenting thereto, and agreeing that the cause might be tried and determined by the remaining eleven jurors, the said John L. Brown is discharged.

And thereupon the cause duly proceeded by hearing the evidence until the hour of adjournment, when by consent of counsel, the jury being admonished by the court and allowed to separate till the incoming of court tomorrow morning.

(Endorsed:) Narcisse Poirier *v.* Northern Pacific Railroad Co. Filed Sept. 22, '93. A. Reeves Ayres, cl'k, by J. O'Neill, dep'y.

43 And afterwards, to wit: on the 23d day of September, 1893, the same being the 17th judicial day of the regular September term of said court, present the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, Defendant.

SEVENTEENTH DAY, SATURDAY, *Sept. 23d*, 1893.

This cause again coming on for hearing, the jury being called, duly answered to their names, and said cause thereupon duly proceeded by hearing the evidence and arguments of counsel till the close of the case, when the jury being charged by the court, retired to deliberate on their verdict, and now after due deliberation, the said jury came into open court, and return the following verdict, to wit:

United States Circuit Court, District of Washington, Eastern Division.

NARCISSE POIRIER
vs.
THE NORTHERN PACIFIC RAILROAD CO. *et al.*

Verdict.

44 We, the jury in the case of Narcisse Poirier against The Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Rouse and Henry C. Payne, as receivers of the Northern Pacific Railroad Company, defendants, find for the plaintiff, and assess his damages at twenty-one thousand, six hundred dollars $21,600.00.

JACOB C. YENTES, *Foreman.*

(Endorsed:) Narcisse Poirier *v.* The Northern Pacific Railroad Co. *et al.* Verdict. Filed Sept. 23d, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 25th day of September, 1893, the same being the 18th judicial day of the regular September term of

said court, the Honorable Cornelius H. Hanford, United States district judge, presiding, the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States, District of Washington, Eastern Division.

NARCISSE POIRIER
vs.
NORTHERN PACIFIC RAILROAD COMPANY *et al.*

Now on this 25th day of September, 1893, on motion of the attorneys for the defendants in this cause, it is ordered: That the defendants have thirty days from and after this date in which to draw up, file and serve a bill of exceptions herein.

C. H. HANFORD, *Judge.*

45 (Endorsed:) Narcisse Poirier *vs.* Northern Pacific Railroad Company. Order extending time to prepare bill of exceptions. Filed September 25, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 23d day of September, 1893, there was duly filed in said court, in said cause, instructions and exceptions, in the words and figures as follows, to wit:

In the United States Circuit Court, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, Defendants.

Defendants' Exceptions to Refusal of the Court to Give Instruction.

Be it remembered that on this 23d day of September, 1893, upon the trial of this cause, and at the close of the testimony of both parties, and after both parties hereto had rested the case, the defendants by their counsel requested the court to give to the jury the following instruction:

"In this case there is no evidence that the defendant, The
46 Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that if there was any negligence, it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

Which instruction the court refused to give, and to which refusal the defendants duly except, and which exception is allowed by the

court, and at their request, this, their bill of exceptions thereto are hereby signed, and ordered to be filed, and made a record in this cause.

C. H. HANFORD, *Judge.*

(Endorsed:) In U. S. circuit court, dist. of Washington, eastern division. Narcisse Poirier *vs.* Northern Pacific Railroad Company, *et al.* Defendants' bill of exceptions to refusal of court to give instructions to jury.

Defendants request the court to give the following instruction to the jury:

"In determining the question of whether the defendant, The Northern Pacific Railroad Company, was guilty of negligence in the management of these trains, or either of them, the jury are instructed that they may consider the rules of the company, which have been read in evidence, and that if it appears therefrom that
47 the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants."

Modified. Exception allowed.

In United States Circuit Court, Dist. of Washington, Eastern Division.

NARCISSE POIRIER
vs.
NORTHERN PACIFIC RAILROAD COMPANY *et al.*

The court having overruled the defendants' request for an instruction to the jury to return a verdict for the defendants;

Now comes the defendants, and further requests the court to give the jury the following instructions:

"If the jury find from the evidence in this case, that the accident which caused the plaintiff's injury, was caused by the negligence of the conductor or engineer of the extra train, in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or engineer of the extra train, then I instruct you that the defendants are not liable, and that you shall return a verdict for the defendants."

Refused. Defendants except.

Now comes the defendants in this action, and after the in-
48 structions of the court to the jury, and before the return of the jury into court, and except to the following portions of the instructions of the court to the jury, viz:

Defendants except to all that part of the instruction of the court to the jury in words as follows:

"Whoever is placed by the employer in the position where he has the responsibility, and the right and power to supply these

means of safety, and to guide the operation of dangerous agencies, whether he is a conductor on a freight train, or a superintendent, or the train-dispatcher, or whoever is clothed with that power, and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects."

"Now applying that general principle to this case: If the evidence shows you that the conductor of either one, or both of these trains, was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions, and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then, whoever else did have that responsibility and power would be the one representing the company."

49 Defendants also except to all that part of the instructions of the court in words as follows, viz:

"Now it is not charged that there was any negligence in the management of the first train, except the negligence of the conductor, and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that."

Defendants also except to all that part of the instructions given by the court to the jury in words as follows:

"If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings, and in the evidence in the case, as a special or extra train, called 'a wild train,' running under special orders as to the time it was to make, where it was to go and when it should reach the different stations; and it was the duty of the defendants to have some one in control of the operation of trains on that road to prevent that train from coming into collision with the regular trains on the road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train, or any one else in authority to control the movements of the trains running over that piece of road."

The foregoing exceptions were presented before the return of the verdict, and allowed. C. H. HANFORD, *Judge*.

50 (Endorsed:) No. —. In United States circuit court, district of Washington, eastern division. Narcisse Poirier, plaintiff, *v.* Northern Pacific Railroad Co., defendant. Instructions and exceptions. Filed Sept. 23d, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 25th day of September, 1893, there was duly filed in said court, in said cause, bill of exceptions, in words and figures, as follows, to wit:

In the United States Circuit Court, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY and THOMAS F. OAKES, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, Defendants.

Bill of Exceptions.

Be it remembered, that on the 23d day of September, 1893, upon the trial of this cause, and at the close of the testimony, and after both parties hereto had rested the case, the defendants by their counsel, requested the court to give to the jury the following instruction:

51 "In this case there is no evidence that the defendant, The Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto; and that if there was any negligence, it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

Which instruction the court refused to give, and to which refusal the defendants duly excepted.

The court having overruled the defendant's request for an instruction to the jury to return a verdict for the defendants, the defendants further requested the court to give the jury the following instruction:

"If the jury find from the evidence in this case, that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train, in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or engineer of the extra train, then I instruct you that the defendants are not liable, and that you shall return a verdict for the defendants."

Which request the court refused, and to which refusal the defendants duly excepted.

And be it further remembered, that thereupon the court of its own motion instructed the jury as follows:

52 *Charge of the Court to the Jury.*

GENTLEMEN OF THE JURY: This case is now to be submitted to you for decision as to the general question of whether the plaintiff

is or is not entitled to recover damages. When I say it is to be submitted to you for your decision as to that general question, I wish to be understood that you are to decide it.

A motion has been made by the attorneys for the defendants to have the judge of the court assume to decide the whole case and take it from the jury. In deciding on that motion, I have not assumed any of the functions of the jury in the case, and I wish you to understand that in denying their motion I have not intended to express any opinion on the question whether the plaintiff is entitled to any damages, or whether he has failed to prove his case, or whether he has not. I have only decided that there is evidence in the case which entitled the plaintiff to have it submitted to this jury, and the responsibility and duty rests upon you of determining the main question in the case whether this evidence is sufficient or not to justify a verdict in his favor. In arriving at your decision upon the whole case, you are to keep in mind the distinct functions of the jury and the court. It is the duty and province of the judge of the court to decide all questions of law that arise in the progress of the trial, and the jury should accept the decisions and instructions of the judge as to what the law is as binding on them. Because if the judge should commit an error it is not for the jury to correct him. There is a court above that is provided to
53 consider these matters, and correct the errors of law that occur in the trial of cases before the judge and jury. So you are not chargeable with any responsibility as to those matters.

Now taking the law of the case as given by the judge of the court, it should be applied to the facts which it is the province of the jury to find from the evidence, and in deciding what the facts are, the jury should be guided by the evidence and determine in accordance with the evidence given upon the trial, uninfluenced by any information derived from any source outside of the trial, and in weighing the testimony and determining its weight and value, and the effect of it, the jury are the exclusive judges. It is their province wholly to decide what the facts are, and apply the facts and law together, and determine what the result of the case shall be.

The rights of the plaintiff involved in this case depend upon the facts which he has set forth in an amended complaint here, in which he has stated the grounds of his action, and it is only in case the facts are found by the jury from the testimony to support the averments in this amended complaint that he is entitled to recover damages. He should be held to the case which he has made in his complaint, and the duty is resting on him to bring here sufficient proof to prove those facts and recover upon the grounds set forth here, and he has no right to recover upon any other ground.

The case as stated in his complaint is that he has been injured—suffered a physical injury—caused by the negligence of the
54 defendant, The Northern Pacific Railroad Company, in the running and operation of two freight trains upon the Spokane & Palouse railway, a line of railway which the Northern Pacific Railroad Company is operating under a lease giving it the control

of that road. The particular negligence charged against the railroad company is that the conductor of the first train, the one upon which the plaintiff was employed as a brakeman, when he brought his train to a stop at Clyde station, neglected his duty by failing to place a flagman a sufficient distance back on the track to warn the following train, which is called the second train in this complaint, of the danger of coming too close to that station while the first train was stopped there; and that the Northern Pacific Railroad Company was also negligent by reason of the fact that this second train was permitted to follow so closely after the first train upon a mountain grade. Now these are the particulars in which negligence is charged in this case, and the plaintiff is to be held to proof of those particular facts. And it is for the jury to weigh the testimony, and determine whether those facts are proved or not, and if they are, then to determine whether the negligence in one or both of the particulars specified is what caused the injury to the plaintiff. Unless there is a concurrence of the two facts, the two main facts of an injury and a wrong, and that they are connected together so that the injury is the result of the wrong, the plaintiff cannot recover. And the defendants are not liable unless those facts concur and are so connected. If you find a concurrence of those facts, and the proper connection sustained by the evidence, then it will be for you to inquire and determine from the testimony the extent and
55 seriousness of the injury, and then go on and determine what amount of compensation the plaintiff should have for it.

In regard to the rule of law as to the liability of the defendants for the negligence of a conductor of a railroad train; that is, the liability of the railroad company to employees of the road for the negligence of a conductor, I will state this to you as the rule: that in the first place it is the duty of every employer to use reasonable care to provide for the safety of employees. The employer is not an insurer of safety, but does undertake to use reasonable care, and the degree of care required is the same amount of care and caution which a man of ordinary prudence usually observes for his own personal safety. The kind of employment, the kind of machinery, and agencies, that are used in the employment, and all the facts and circumstances are to be taken into account to determine when there is negligence; that is, a lack of the degree of care and caution that is required. Men and corporations have the right to carry on enterprises that are hazardous, and they have the right to employ workmen to assist in carrying on those enterprises, who by their contract engaging in such work assume risks of personal injury. They assume all the risks that are ordinarily to be expected from the position in which they undertake to work, and all the risks and hazards that are obvious and can be seen by a man having sense and information enough to be competent to perform the work which he undertakes to perform; provided that the employer shall not expose him to any unusual and unexpected risk, which could
56 be avoided by the exercise of ordinary care and prudence. That degree of ordinary care and prudence which the ordi-

nary prudent man usually exercises for his own personal safety. The duty which an employer owes to his employees, whether that employer is a corporation or a natural person, to provide proper means, facilities, and appliances for carrying on the work with reasonable safety, cannot be so delegated to any subordinate or agent as to exempt the employer from liability to an employee if an injury happens to him through a neglect of that duty. So that whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety and to guide the operation of dangerous agencies, whether he is a conductor on a freight train or a superintendent, or the train-dispatcher, or whoever is clothed with that power, and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects.

Now applying that general principle to this case,—if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movements of the trains, without any restrictions upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten responsibility on the employer. If the conductors were
57 not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company.

Now it is not charged that there was any negligence in the management of the first train, except the negligence of the conductor, and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that. If he was not negligent, the defendants are not liable for this accident. If he was not negligent, the defendants would not be liable for this injury by reason of its occurrence, and just so, if the proof fails to show this jury that the conductor had the power and responsibility to manage the train the defendants would not be liable, even if he was negligent, because if he was only acting in subordination to somebody else who had the power and controlled the operations of the trains, he would occupy the position of a fellow-servant to the plaintiff, and the defendants would not be liable for his negligent acts.

If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence in the case as a special or extra train, called a wild train, running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendant to have some one in control of the
58 operations of trains on that road to prevent that train from

coming into collision with the regular trains on the road. And whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train or any one else in authority to control the movements of the trains running over that piece of road.

Now you will consider from the evidence in this case whether there has been any negligence on the part of any one having the authority and power and responsibility for the operation of the road as to the second train. If there was such neglect, the defendants are liable for the consequences to the plaintiff in this case of that neglect. If there was no such neglect of duty, there would be no liability, and no ground upon which the plaintiff can insist that the defendants shall compensate him for the injury which he sustained.

If you find that the plaintiff has been injured in consequence of negligence, for which the defendant, The Northern Pacific Railroad Company, is responsible, that is, to blame, or in fault, that is that the injury is the approximate and direct result of that neglect or fault, then, as I have already stated to you, you must determine from this evidence as to how much, and how seriously and to what extent, the plaintiff has been injured. That is one of the controverted points in the case.

The plaintiff contends, and he has introduced evidence here to explain to the jury what the facts are, contending that the
59 wound which he received, the shock to his nervous system, has been of such a character that he has not yet recovered from it, and that he is liable to be permanently affected and disabled from performing labor by reason of those injuries. The defendants have introduced the testimony of Dr. Buckley, who is in charge of the hospital where the plaintiff went for treatment, and remained a month immediately after the injury, and the testimony of Dr. Essig and Dr. Pomeroy, who have recently examined him, to show that it is not clear that any suffering that he is now subjected to is the result of that injury. It is argued that the testimony fails to show any visible mark or sign of a physical injury, which would be sufficient to account for the condition in which he now appears to be, and that there is a probability that his apparent condition of disability is feigned, that he is acting a part, for the purpose of influencing this jury to award him a large sum of damages.

It is also contended on the part of the defendants that, although the plaintiff may himself believe that he is seriously injured, and that he is not intentionally trying to deceive any one, his condition is the result of having been associated with doctors for treatment, and others who have talked to him about his injuries, until he has been deceived himself, and in consequence of imaginary ailments he now has the appearance which the doctors have indicated.

There is testimony tending to show that it is possible for persons, by clever acting, to deceive even skilful surgeons as to their condi-

tion. That it is possible also for persons to be deceived themselves, and to appear and suppose they feel ailments which are not really the result of disease or injury, but are purely imaginary, and from which they may recover when the mind is brought to a state of assurance that they are not so suffering.

60

Now the whole matter is left to this jury to weigh this testimony, and determine what the facts are in regard to the extent of the injury to the plaintiff. I can only tell you what his rights are under the law; and I can only instruct you that every case of this kind, which appears to be seriously controverted, calls upon the jury to scrutinize and carefully weigh, and determine according to the testimony conscientiously what the facts are in regard to it. This is a case which calls upon this jury to consider every fact and circumstance detailed in the evidence surrounding the case and determine how seriously this man has been injured, in case you find from the evidence he is entitled to charge the defendants with liability at all.

The general rule of law in regard to what the rights of a person are in having damages assessed for an injury is this: The sufferer is entitled to compensation from the person by whose fault the injury occurred for the pain resulting from the corporeal hurt so long as it produces pain. Also for mental suffering naturally resulting from the injury or wrong, whether such suffering be apprehension and anxiety from its depressing effect or induced by its alarming character. For impaired health and working capacity, mutilation or disfigurement; for the expenses of nursing, care, and for all other detrimental effects which naturally and approximately ensue.

61

The damages recoverable for bodily pain and suffering are not limited to that which is past,—where the proof renders it reasonably certain that the injured party must suffer in the future.

Now I will try and elaborate that so as to be sure that you get the idea. The actual physical pain caused by an injury is an element of damages, something to be compensated for. The severity of the pain and its duration are to be taken into account so long as there is actual physical pain and suffering. And in fixing a measure of damages for pain, for disability, caused by a physical injury, the right to compensation is not limited for pain and suffering or incapacity which has already happened and is past. The injured party is entitled to be compensated for that which he is to suffer in the future, provided the evidence satisfies the jury that it is reasonably certain that he must suffer in the future. He cannot recover for suffering in the future if the chances are just about even whether his disability or suffering will continue or whether he will recover from it. But if the evidence shows that it is reasonably certain—not absolutely certain, but reasonably certain—that he must suffer, then and only then can he claim compensation for the future suffering or disability.

Now included in what is termed every other detrimental effect from an injury is to be taken into account the loss of ability to earn

money, and every matter that is an absolute pecuniary loss to a man by reason of an injury may be taken into account. There is no fixed rule by which to measure the effect of an injury so
62 as to balance money against the injury, but that is a matter that is left to the jury to exercise judgment, and according to what seems to you to be fair and right to fix upon some sum of money which shall be reasonable compensation for the amount of injury and the detrimental effects, including pain and mental anguish, and so on, as I have stated the rule to you.

This is not a case in which any sum should be allowed for the mere purpose of punishing the railroad company, nothing in the way of vindictive damages; you are to consider only the plaintiff when you come to fix the amount of damages, and what would be a fair and just sum to allow to him as compensation.

I want to caution you, if you allow any damages in this case, and have to fix the amount of it, that whatever sum is fixed upon must be such a sum as you, all of you, are able to agree to as being a proper sum, and such a sum as you will all be able to answer in court as according to your judgment a proper verdict to render in the case. Juries sometimes resort to a method of getting at the sum to allow as damages by each one giving his figures and adding them all together, and then dividing that gross amount by twelve, when there are twelve jurors, or eleven, or whatever number constitutes the number of jurors, and taking the quotient as the amount of the verdict. Now a jury which renders a verdict by that system, if it is a mere result of the bringing together of those figures, without being the true opinion of each juror as to its being a proper amount, would be an illegal verdict, and if it should be shown in any case that the verdict was fixed upon in that way, the court would set it aside, and try the case again.

63 It is important, as this case has been fully and fairly tried, that the jury should agree upon a proper verdict in the case, and when they do agree, and render it, that it should be a legal verdict which cannot be disturbed and set aside.

Mr. ALLEN: I have an additional instruction, which has been called to my mind, and I would like to have your honor give it.

The COURT: There is one thing more which I will speak of, which the jury have a right to take into account in assessing damages, and that is the expectancy of human life. By the keeping of tables of mortality, the average duration of human life can be calculated, and juries have a right to take into account the probable duration of a man's life in cases where damages are to be assessed for permanent injury. If you find that this is a case in which you are justified in fixing upon a measure of damages on account of the permanent disability of the plaintiff, the lifetime of the plaintiff would be about thirty-three years from the time of the happening of the injury. A person not affected by any constitutional or organic disease at the age of 32 would have an expectancy of 33 additional years.

In determining the question whether the defendant, The Northern Pacific Railroad Company, was guilty of negligence in the man-

agement of these trains, or either of them, the jury are instructed that they may consider the rules of the company which have been read in evidence, and that if it appears therefrom that the running and conduct of the second train was provided for, and that
64 the accident was caused by the engineer or conductor of the second train disregarding such rules, the defendants would not be liable for the result of the disregard of such rules, unless it appeared that the conductor of the train, or some one under whose orders he was acting, had authority in the special case to deviate from the rules.

I have prepared a form of verdict which you will use after you have decided the case.

Thereupon, the defendants in this action excepted to the following portions of the instructions of the court to the jury, viz:

Defendants except to all that part of the instruction of the court to the jury in words as follows:

"Whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety and to guide the operation of dangerous agencies, whether he is a conductor on a freight train or a superintendent, or the train-dispatcher, or whoever is clothed with that power, and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects.

"Now applying that general principle to this case, if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with
65 responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company."

Defendants also except to all that part of the instructions of the court to the jury, in words as follows, viz:

"Now it is not charged that there was any negligence in the management of the first train, except the negligence of the conductor, and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that."

Defendants also except to all that part of the instructions given by the court to the jury, in words as follows:

"If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings, and in the evidence in the case, as a special or extra train, called 'a wild train,' run-

ning under special orders as to the time it was to make, where it was to go and when it should reach the different stations; and it was the duty of the defendant to have some one in control of the operation of trains on that road to prevent that train from
66 coming into collision with the regular trains on the road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train, or any one else in authority to control the movements of the trains running over that piece of road."

The foregoing bill of exceptions, having been found to be correct, the same is hereby signed and sealed and made of record herein. And I further certify that the same contains all the instructions that were given in this action.

Dated this 25th day of September, 1893.

C. H. HANFORD, *Judge.*

(Endorsed:) In United States circuit court, district of Washington, eastern division. Narcisse Poirier *vs.* Northern Pacific Railroad Company *et al.* Bill of exceptions. Filed Sept. 25th, 1893. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 25th day of October, 1893, there was duly filed in said court in said cause, bill of exceptions, in the words and figures as follows, to wit:

In the Circuit Court of the United States, District of Washington, Eastern Division.

67 NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY, THOMAS F. OAKES, Henry C. Payne and Henry C. Rouse, Receivers of the Northern Pacific Railroad Company, Defendants.

Bill of Exceptions.

Be it remembered: that on the trial of this action before Hon. Cornelius H. Hanford, judge, and a jury, begun at a regular term of said court held at Spokane, in said district, on the 21st day of September, A. D. 1893, and subsequent days, the following proceedings were had, to wit:

Appearances.

For plaintiff—Hyde, Glass & Reagan; and Crotty, Bushnell & Kimball.

For defendants—Ashton & Chapman, and McBride & Allen.

A jury was thereupon impanelled and sworn to try the case, and opening statement of the case made to the jury by Mr. Hyde.

Mr. Hyde thereupon requested leave to amend the complaint in this case on the trial, upon the grounds set forth in his affidavit to be served and filed with the amended complaint.

68 A recess was thereupon taken until 11 o'clock a. m., when the attorneys for plaintiff served and presented to the court their amended complaint.

The court stated that the amendment would be allowed, unless attorneys for defendants made some special showing of surprise.

Mr. Allen asked that the new allegations of the amended complaint be at this time considered as denied, and that the defendants have leave during the trial, or after the trial, to file an answer making them so denied.

The court stated that that would be allowed.

Mr. Allen then requested that the plaintiff submit to a medical examination by physicians to be selected, to ascertain the plaintiff's injuries and condition at this time, and named Drs. Buckley, Essig, and Pomeroy as the examining physicians on the part of the defendants.

Mr. Hyde stated that the plaintiff would consent to such examination provided the plaintiff was allowed to have one or more experts present, and named Drs. Harvey and Smith as the examining physicians on the part of the plaintiff,—the examination to be made during the noon recess of the court.

Court thereupon took a recess until 2 o'clock p. m.

Afternoon Session—2 *p. m.*

JESSE J. ALLEN, being called and sworn as a witness on behalf of plaintiff, testified as follows:

69 Direct examination by Mr. HYDE:

Q. State to the court and jury your name.
A. My name is Jesse J. Allen.
Q. Where do you reside?
A. I reside at Reardon, Lincoln county, Washington.
Q. What is your age?
A. Fifty-four.
Q. What is your occupation?
A. I am following blacksmithing now.
Q. You learned the trade of a blacksmith when you were young?
A. I did, when I was a boy.
Q. What has been your principal occupation during life?
A. Railroading.
Q. How long have you been engaged in railroading?
A. I have been engaged in railroading the best part of the time since the 5th day of July, 1862.
Q. What part of the work of railroading have you followed?
A. The principal part of the time I have been running a train as conductor.
Q. I will ask you to recall the matter—in the fore part of October, 1892—in what business were you then engaged?
A. I was braking.
Q. For whom?

A. For a man by the name of Somis, on what is called the Palouse branch of the Northern Pacific.

Q. You were practically in the employ of the Northern Pacific Railroad Company?

70 A. Yes, sir.

Q. As a brakeman?

A. As a brakeman.

Q. I will ask you if you remember an incident in which there was what they call a rear-end collision on your train about the 7th day of October, at a place called Clyde station?

A. I do.

Q. Tell the jury how that train that you were on was made up.

A. It was made up, and consisted of box cars and flat cars; the box cars were back next to the caboose and the flat cars were ahead of that and between that and the engine. The engine was ahead of the caboose.

Q. What was at the end of the train?

A. The rear car was a caboose.

Q. Do you remember how many cars were in that train?

A. I could not say positively how many cars there were, but I should say there were from six to ten cars; there may have been more or less.

Q. Who was the engineer of the train?

A. Mr. William Parr, I believe.

Q. Who was the conductor?

A. Somis, I do not know what his given name is.

Q. How many brakemen were there on the train?

A. Three.

Q. What was the name of the brakeman next to the engine?

A. Grant Tinling.

Q. Who was the next one?

A. Poirier.

71 Q. That is the plaintiff in this action?

A. That is the plaintiff in this action I believe.

Q. Who was the next?

A. Myself.

Q. Who was the conductor?

A. Mr. Somis.

Q. You were in the employ of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. And they were operating this train?

A. They were supposed to.

Q. At what time of night did you reach the place of Clyde—where is Clyde?

A. I had no timepiece, and I judge from the place where we stopped at supper, and where the passenger train passed us, it was about 12 or 12.40 in the morning, or midnight.

Q. Tell the jury where this place of Clyde station is?

A. It is about half way between Vollmer and Kendrick.

Q. What State is it in?

A. Idaho.

Q. Which way was your train running?

A. It was going what is called west.

Q. It was running southeast, was it not?

A. The road runs at nearly all points of the compass down there; it is in a ravine amongst the mountains.

Q. What kind of a grade were you running on?

A. It is considered to be a mountain grade all the way from Howell down to Kendrick, about 16 miles.

Q. Is Kendrick the end of the road?

A. No, sir.

72 Q. Is this on the Genesee branch, or on the other branch?

A. It is what is known as the Lewiston extension.

Q. Where was this train made up; where did it start from?

A. It started from Spokane.

Q. At what time of day?

A. In the morning about 7 o'clock.

Q. What was this train as to being a regular freight, or what kind of a train was it, and how was it run?

A. It was scheduled as a regular local freight, does local work and carries passengers provided with tickets.

Q. Tell the jury what kind of a grade that was, as to being—if you know—steep, or heavy grade, or light?

A. It is a very steep, heavy grade; very heavy.

Q. From what point?

A. As I stated before, from Howell to Kendrick.

Q. Do you know the grade at any of those places?

A. Yes, sir; I helped build the road.

Q. What is the grade?

A. It will run, I believe they claim to call it a 2½ per cent. grade.

Q. Go on and tell the jury, all that you saw, and all that was done and all that you heard, and the whole facts about the rear-end collision; tell which way the train was running; you were going away from Spokane?

A. Yes, sir; we were going from Spokane and towards Julietta; that is the end of the line, that is so far as the road is operated; the road is laid down further, down to the Indian reservation, but it is not operated down there and was not at that time. Julietta is as far as we run anyhow.

73 Q. Go on and tell all about the accident.

A. We were a regular train behind our time and went down this hill; we had some work to do at Vollmer; that's about three miles down the hill, and we stopped there and done the work; and before this when we were at Moscow there was an extra come up behind us when we were on another spur over towards the city, doing some work. We done our work there and went on down the hill and they followed with an extra, or wild train, and it was running by telegraphic orders and had no scheduled orders, or time-card.

Judge McBride: How do you know? You need not state if you do not know.

Mr. HYDE: State what else you know about it.

A. We left Vollmer and went down to Clyde spur, and we had some cars to drop out on a track where they loaded cars, and we were just stopped there and I saw a headlight coming behind us. I was on top of the train setting brakes. I swung them up but they paid no attention to it, and I didn't have time to get down and flag them and I couldn't have left the train if I had.

Q. What do you mean by "swinging them up"?

A. It is a signal of danger, and to stop. We had got stopped and I don't think we were stopped a full minute before they struck us, but before they struck us I "hollered," and when I "hollered," they showed some sign of stopping, and the conductor that I was with got down out of the cupola and came forward about one car's length ahead of the caboose when they struck. They struck that
74 hard, that it took three or four pulls of both engines to separate that engine from the caboose and knocked the platform off and broke the pilot off the engine in the rear. Mr. Poirier was in the act of pulling a pin to drop out these cars and the crash into the train throwed him from the train down in amongst some rocks and bruised his head up, and back and other places that he complained of, and when we got the wreck cleared away, we took him into the caboose, and when we got down to Kendrick he was taken the next morning back on the passenger train. I understood afterwards he was taken to Missoula, but I don't know whether he was or not.

Q. When the first train came to a stop, where were you standing?

A. I was standing on the third car from the caboose.

Q. That was a high box car?

A. Yes, sir.

Q. How long before that had you been in the caboose?

A. I came out of the caboose about four or five miles above there, just after we left Vollmer.

Q. Where was the conductor of your train?

A. He was up in the cupola lying down.

Q. Where was he at the time the train came to a stop?

A. He was in the cupola.

Q. Do you know what situation or position he was in?

A. I could not say positively, because I was three cars from there, but I saw him take his light and get down after I "hollered."

Q. And that was after the train stopped?

75 A. That was just as the train stopped.

Q. What did he do then?

A. He went out and jumped off the hind end of the caboose and started forward towards his own engine and got about one car from the caboose when the collision took place.

Q. State to the jury, what, if any order he gave you as to flagging.

A. He gave me no orders at all.

Q. Where was Mr. Tinling at this time?

A. I didn't see Mr. Tinling, but I know where he said he was, and where he was supposed to be. Going down to the switch to open the switch, to let these cars drop in.

Q. Can you explain to the jury the position Poirier was in when the collision took place?

A. I didn't see him, he was out of my sight entirely, but I know where he was—that is, as well as a person could know on a train, and from the place where he was picked up.

Q. Where was he standing?

A. He was on a flat car.

Q. Where was he standing on the flat car with reference to the box car?

A. He was standing right close to the end of the flat car, and the box car was coupled to it.

Q. How severe was the shock of this collision?

A. It was severe enough to break the pilot off the engine and the platform of the caboose, and drove them together so tight that it took three or four pulls to pull them apart, and it knocked me down——

Q. Explain how that was.

76 A. There is very little to be explained there. They struck so solid that they knocked me off my feet; they struck pretty solid. I judge they were coming 6 or 8 miles an hour when they struck.

Q. You don't know the name of Mr. Somis, the conductor of the train you were on?

A. I don't know his given name. No I don't.

Q. I will ask you, if you knew this plaintiff in this action, Poirier, prior to this action?

A. I did.

Q. He was brakeman on that train?

A. He was.

Q. How long had you known him?

A. About two or three weeks.

Q. While he was braking there?

A. Yes, sir.

Q. I will ask you if you knew his physical condition as to health or strength?

A. I never knew him to complain of anything of that kind, but what he was an able-bodied man, and always done his work, and good work. He was well enough to do his work, and he took the best man's place on the train and did the work.

Q. You are familiar with the duties of a brakeman, and it requires a strong and active man?

A. Yes, sir.

Q. And he filled the place?

A. He filled the bill.

Q. Have you seen him since that time?

A. I have.

Q. I will ask you what his condition is now, and has been

77 at the times you have seen him since, compared to what it was before the accident, as to his health and physical condition?

Mr. Allen objected to the question as incompetent.

The court overruled the objection, to which ruling the defendants except.

A. I didn't consider him an able-bodied man and I do not consider him fit, nor competent to do any kind of railroad business.

Q. Tell the jury what his condition is now, and explain it and describe it.

A. I have been more or less connected with him since it occurred and I have seen him and talked with him a great many times, and he is a man the least excitement throws clear off, and he don't know nothing, and his nerves are all gone, and he isn't fit, and he cannot walk over to the Monroe Street bridge and back, fast, without he is played out and cannot hardly breathe.

Q. Did you notice his hearing?

A. His hearing is bad at some times, and again he can hear, according to how the weather is, I think, regard to his ears.

Q. Have you noticed his condition as to the condition of his muscles, and as to weight and emaciation?

A. I should judge he didn't weigh as much into 25 pounds; I don't think it would vary a great deal from that. At the time he was hurt, he was a strong, robust and hearty young man.

78 Q. Did you notice his condition with reference to any particular motions, or trembling, or twitching?

A. I have. He is very nervous, and he has got no muscle or strength at all.

Q. How are his mental faculties?

A. I don't consider him capable of doing any kind of railroad business. I have run trains a great many years and I don't know that I have ever been relieved from a position in my life on account of my not attending to my business, and I would not trust him to go over the top of a train.

Q. What is the reason, and why wouldn't you?

A. Because if anything would happen I think he would jump right off the train anywhere; I don't think his mind is right, in fact, I know his mind is not right.

Q. State to the jury, wherein it differs from what it was before this accident—his mind or memory; explain the difference.

A. I don't know as there is any way to explain it. He came to the road well recommended.

Q. How does he appear now, compared to what he did before?

A. He doesn't appear more than a child now to what he was then. His mind seems to be impaired and like an imbecile.

Cross-examination by Mr. ALLEN:

Q. What time of the day did you say you left Moscow?

A. I didn't say what time we left Moscow.

Q. Where did you get your supper?

A. At Pullman.

79 Q. It was after dark, somewhere about 7 o'clock, or somewhere there; you left after you got your supper?

A. We done some little work after we had supper; I had no timepiece.

Q. Did you leave somewhere between 7 and 8 o'clock?

A. Somewhere along about 7 o'clock.

Q. Do you know what the distance is between Pullman and Moscow?

A. I don't remember just what it is.

Q. How long had you been braking on this road at that time?

A. About two weeks.

Q. On that particular road?

A. Yes, sir.

Q. You do not know what time you got to Moscow?

A. I could not say positively what time we did get there. I judge from the time we were eating, and doing our work, and the work we had to do and did, that it would be about 12 or 12.45 that the accident happened.

Q. Do you know what time you got to Kendrick that night?

A. I do not.

Q. You didn't pay any attention to the time?

A. No, sir.

Q. Do I understand you to say that when you left Moscow this extra train was right behind you there?

A. It was.

Q. How long after your train pulled into Moscow was it before this extra train came in behind you?

A. I couldn't say just how long it was.

Q. About how long?

80 A. We had done our work at the station and drawn up and gone over across to a spur track over by the city, on an elevator track, and were doing some work and were down in there when they came up to Moscow.

Q. And they waited until after your train pulled out?

A. Yes, sir.

Q. Where did you next see this extra train?

A. At Vollmer.

Q. You didn't see them at Howell?

A. Yes, sir; I believe it came down at Howell when we were there.

Q. How near was it to your train when you arrived at Howell?

A. I couldn't say how near it was, and it was not there when we stopped.

Q. How long did you stop at Howell?

A. I cannot say how long we were there. I would not swear positively that we had stopped there.

Q. You are not certain about it?

A. No; for I don't know whether we did any work there, but I think we stopped to set out some cars.

Q. How far is it from Howell to Vollmer?

A. About three miles.

Q. How long did you stop at Vollmer?

A. I couldn't say, but long enough to drop out some cars and to do a little unloading and some loading.

Q. Did you see this extra train there?

A. Yes, sir.

Q. How long was it after you got into Vollmer before this extra train came up?

A. We dropped the cars in there—we stopped out, and dropped the cars in there and dropped down to the station before they came in.

81 Q. How long did that take?

A. About 5 or 6 minutes—may be 8 or 10.

Q. Did you pull out of there immediately after that?

A. We pulled out of there as soon as we got done with that work.

Q. This extra train had come up about the time you got the work done?

A. Yes, sir.

Q. How long was it from the time you got there until this extra train pulled up behind you?

A. I don't know as I could tell how long it was.

Q. Give us your best judgment?

A. Probably eight or ten minutes.

Q. And then you started for this Clyde spur?

A. Yes, sir.

Q. How long did it take you to run down there that evening?

A. I judge we went down that canyon all the way from 15 to 18 miles an hour and maybe faster in some places and less in some places.

Q. How far was it?

A. In the neighborhood of five or six miles.

Q. I understand you to say that when your train pulled up, just about the time it stopped, you looked around and saw the light of this other engine coming?

A. I did.

Q. That is just about the time your train was stopping?

A. Yes, sir.

Q. At that time you were the rear brakeman?

A. Yes, sir.

82 Q. Was it a part of your duty to be out on the top of the cars going down the mountains?

A. Yes, sir.

Q. It was the duty of all of the brakemen to be out on the train to help out in cases of accident?

A. Yes, sir.

Q. And you were in your proper place?

A. Yes, sir.

Q. And the conductor was in the caboose?

A. He was.

Q. You left him in the caboose shortly after you left Vollmer?

A. I did.

Q. You say, that just as you saw this headlight, you hollered. Didn't you say that you hollered?

A. I didn't say that I hollered when I saw the headlight. I said I swung them up repeatedly, and then I hollered when they didn't stop.

Q. Is that the swinging of your lantern?

A. Yes, sir, across the track.

Q. You were on top that part of the car in plain view of the approaching train?

A. I was.

Q. About how far was the approaching train from the rear end of the caboose when you first saw them; about how far was it?

A. They were—to measure it on the track—all of a quarter of a mile if not more. There is a large curve there.

Q. Was your light high enough up so that it could have been seen by the engineer of this extra a quarter of a mile away?

83 A. I think it could, I don't know why it could not.

Q. Did you commence swinging your lantern the moment the extra came in sight?

A. Just as soon as I saw the extra.

Q. What response did the extra give to the swinging of your lantern?

A. None that I saw.

Q. And you swung them up several times?

A. I did.

Q. And then you hollered, who were you hollering to?

A. I didn't holler to anybody in particular, but I just let a yelp, or something out of me, something like a Comanche chief, as near as I could.

Q. Did they not sound the whistle or ring the bell?

A. No, sir.

Q. And no alarm given at all?

A. No, sir, not that I heard and I would have been apt to hear it if they had.

Q. They just came tearing down along there?

A. They came tearing down along there all right enough.

Q. At what rate of speed was that train coming at the time you first saw it—the extra?

A. I couldn't tell, they were too far off, but I judge when they struck they were coming from four to five miles an hour.

Q. Did you have any means of telling when they commenced to try to stop the train from where you were?

A. Nothing any more than my hearing and seeing.

Q. What did you see or hear to indicate whether they did or did not?

84 A. You can usually hear the air when it is applied, or the engine pulled over.

Q. Did you hear this?

A. I did not.

Q. Were you in a position where you could have heard it if it had been done?

A. Yes, sir.

Q. If the lever had been pulled over or the air applied, either one, you think you could have heard it?

A. I think I could.

Q. How close to the caboose did the engine get before they commenced applying the brake, if you know?

A. I couldn't say when they did commence.

Q. Did you give any warning to your brakeman on your train when you saw this train coming up?

A. I didn't.

Q. Why didn't you give them some warning?

A. I had but very little time to protect myself, let alone telling the brakemen to get out of the way.

Q. What did you do to protect yourself?

A. I stood right on the top of the car, because I had a better show there than to get on the ground.

Q. You didn't even have time to get on the ground?

A. No, sir.

Q. Was the train coming at such speed at that distance away?

A. A quarter of a mile down a mountain is a very short distance.

Q. But if the train is not running over five or six miles an hour, it takes time to get a quarter of a mile?

A. Yes, sir, it might have been running faster than that, or it might not.

85 Q. But you did not have time to get down off the train?

A. No, sir; I did not have time to get down to the ground and save myself by getting away from the train.

Q. How many car-lengths was it from where you were to where you say Mr. Poirier was on the flat car for the purpose of uncoupling the car?

A. I do not just remember how many flat cars we had in the train that night, or how many cars we had, but I was on the third car from the caboose.

Q. If there were seven box cars?

A. There would have been four cars between me and the flat car.

Q. Did you know at the time you saw this train coming up when you swung your lantern that Mr. Poirier was about to undertake that uncoupling?

A. I didn't know what he was about to do, or anything at all about it. I knew what he was supposed to do when we stopped there to get the cars out.

Q. Did you know that he was the man to uncouple the flat cars from the box cars, for the purpose of side-tracking the cars?

A. Yes, sir.

Q. And you expected him to be there?

A. I did.

Q. You made no attempt to warn him?

A. I made no attempt to warn anybody, only a holler as I told you.

A. At this time Mr. Tinling, the head brakeman, was in the act of going down to be ready to turn the switch when the engine passed over it?

86 A. Yes, sir.

Q. At the time when this accident occurred, state whether or not the engineer of your train had slacked back his train for the purpose of giving the pin to Mr. Poirier.

A. I could not say whether he had or not, but if he had, he wouldn't have had more than time to do it, if he had at all.

Q. You say you saw the conductor get down out of the caboose?

A. I did.

Q. Did he get down out of the caboose before or after the train stopped?

A. After we stopped.

Q. Just after you stopped?

A. Yes, sir.

Q. Immediately afterwards?

A. Immediately afterwards; just as I hollered.

Q. Do you know which end of the car he went out of?

A. He went out of the back of the car, at least that is where his light came from.

Q. How long was he on the back end of the car before the train struck you?

A. He merely had time to go two car-lengths, the length of the caboose and the length of the box car.

Q. And you say he ran down the track towards the engine?

A. He came down the track towards his own engine.

Q. Do you know whether or not he saw the approaching train?

A. I do not.

87 Q. Was he out of the car when you hollered?

A. No sir, he was still in the caboose.

Q. Then you must have discovered this train coming almost before you had come to a stop?

A. I did. We had not come to a thorough stop when I discovered that train coming.

Q. And he had just barely time to get off of the caboose when the train struck you?

A. He had time to get two car-lengths.

Q. Were you in a position to see behind the caboose to see what he did if anything, to warn the train?

A. No sir, I couldn't see what he did on the platform.

Q. How long after you saw him on the ground out of the caboose, before you saw him on the side of the train; about how long?

A. About as long as it would take you to go from where I am out where you are and jump out of sight, if you were in a terrible hurry.

Q. Was there a platform?

A. The platform of the caboose.

Q. You don't want to be understood, that he got down on the platform on the side of the train?

A. He went out of the back door of the caboose on the platform, and stepped down off the steps and when he got off of the steps was the first I saw of him.

Q. After you saw him come out from behind the caboose, where was this approaching train then; how far was it away?

A. It was probably two or three car-lengths.

Q. And coming at the rate of six or eight miles an hour.

88 A. Coming along somewhere in that neighborhood.

Q. Do you know whether that was the first he had seen of that train or not?

A. No. He had seen it before.

Q. Did you hear him holler in any way?

A. I didn't.

Q. I understand you to say you have been railroading how many years?

A. Since 1862 up until the last two years.

Q. A good deal of that time you have been in the capacity of conductor?

A. I have.

Q. On what roads?

A. I commenced on what is known as the Michigan and the Northern Indiana, and it is now the Lake Shore and Michigan Southern.

Q. How long did you work there?

A. Several years as brakeman and conductor and yardmaster.

Q. Where did you work next?

A. I went from there to the Wisconsin Central.

Q. In what year?

A. I don't just remember the year I went there, but it was when they first commenced building the road.

Q. How long did you work on that road?

A. About a year and a half.

Q. In what capacity?

A. I worked there as brakeman and conductor and also had charge of putting up a telegraph line there.

Q. And from there where did you go?

A. I went back to the Lake Shore.

Q. And worked there how long again?

89 A. About a year.

Q. In what capacity?

A. As yardmaster in the Elkhart, Indiana, yard.

Q. Where did you go then?

A. From there I went to the Missouri, Kansas and Texas.

Q. On what part of their road?

A. On the north end, known as the Sedalia division, between Hannibal and Sedalia. I was there about three months, as brakeman and conductor both.

Q. From there where did you go?

A. I went on the Hannibal and St. Joe.

Q. How long were you there?

A. I was there several years.

Q. In what capacity?

A. As conductor and brakeman both.

Q. Which were you, conductor or brakeman first on the Hannibal and St. Joe?

A. I was brakeman first.
Q. Of freight or passenger?
A. Both.
Q. Where did you go then?
A. I went from the Hannibal and St. Joe to the Omaha road, at St. Paul.
Q. That is the Chicago, St. Paul, Minneapolis & Omaha?
A. That is the road.
Q. How long did you work for them?
A. I worked there a year.
Q. Did you have the fortune to be a conductor there?
A. Yes, sir; it is generally the case if a man gets a train he has to brake awhile.
90 Q. Where did you go then?
A. I went on the Milwaukee system; it is the Wisconsin River Valley road branch.
Q. Were you conductor and brakeman there?
A. No, sir; I was running the yard there and switching in the yard.
Q. And from there where did you go?
A. To the Baltimore & Ohio and remained there until 1888.
Q. Then where did you go to?
A. I came on to the Dakota division of the Northern Pacific.
Q. How long have you worked for that company?
A. I worked there until three years ago the 20th of last January, as conductor.
Q. On freight or passenger?
A. On freight on the Dakota division under A. J. McCabe, superintendent.
Q. Between Bismarck and Fargo?
A. Yes, or Mandan and Fargo.
Q. How many years did you work there?
A. I worked there from 1888 until I came up here, three years ago, 1890.
Q. Where did you work here?
A. I worked on the Central Washington from the 7th day of April until about the 20th of October the following year.
Q. As conductor or brakeman?
A. As conductor.
Q. On passenger or freight?
A. On a construction train.
Q. Then where did you go to work?
91 A. Then I didn't do any more railroading until I was called to go down to the Lewiston extension of this road where this collision occurred, and I went down there and run three months.
Q. As a brakeman?
A. No, sir, as a conductor.
Q. I will ask you if you were examined to see whether you were competent to work as a brakeman by some of the officers of the company.

A. Yes, sir, I was.
Q. And you were rejected, were you not?
A. Yes, sir.
Q. And you have done no railroading since that?
A. No, sir.
Q. About what time were you examined?
A. Along in October.
Q. How long after this accident that you have spoken of?
A. I don't think it was over two weeks if it was that.
Q. Have you not been interesting yourself considerably with this plaintiff's case?
A. I don't know that I have. No, sir.
Q. Are you positive about that?
A. I do not know that I have interested myself in it in any ways.
Q. Have you not taken some of the attorneys for the plaintiff up and introduced them to the officials of the road so that they might find out something about the case?
A. No, sir.
Q. Did you not take Mr. Crotty here, and take him up to the depot and introduce him to Mr. Parr?
92 A. Do you call him an officer of the road? I did introduce him to Mr. Parr.
Q. To an engineer of the road?
A. I did, yes.
Q. Have you taken any more of the attorneys up and counseled with other engineers or servants of the road?
A. I don't think I have. I don't know a great many of them.
Q. Is that your handwriting (witness shown paper)?
A. Yes, sir.
Q. You wrote that note, did you?
A. Yes, sir.
Q. And gave it to Mr. Tinling?
A. I gave it in a report.

Mr. ALLEN: We will ask that this paper be identified, as shown the witness so that we may introduce it.
Mr. HYDE: We have no objections (paper handed to court and marked for identification).

Q. You say that you did not hear this extra blow any whistle or ring any bell?
A. I did not.
Q. If they had blown a whistle or rung a bell when approaching this curve coming down, just before they got to the Clyde spur, would or would not you have been likely to have heard it?
A. I would have been apt to hear it, being on the train. I would have heard the whistle sure.
Q. If they had blown any whistle at all, you would have heard it?
93 A. I think I would.
Q. What makes you think you would have heard it?

A. Because in the night, down one of those canyons, the noise goes a great ways.

Q. You were on top of the car?

A. Yes, sir.

Q. Is it not a fact that coming down a grade like that, that a train does not use any steam?

A. They are not supposed to use any steam.

Q. Consequently the train would come down rather stealthily and without making very much noise?

A. That would be about the situation, only the rumbling of the train; that would be about all the noise they would make.

Redirect examination by Mr. HYDE:

Q. There was something asked you about going to the depot to introduce Mr. Crotty to Mr. Parr. What was there about that? Explain that.

A. I was asked if I would take some of the lawyers or Mr. Crotty to the depot to introduce him to Mr. Parr, and I took him up there with me and introduced him to Mr. Parr.

Q. He asked you to go?

A. Yes, sir; he wanted to meet the man. I do not know whether it was about his testimony, but I naturally supposed it was to see him about his testimony; that would be the natural supposition.

Q. You stated something about being rejected as an applicant for the position as conductor, upon an examination?

94 A. I was asked if I was not examined and rejected on account of brakeman, and I told him I was.

Q. Explain it to the jury, how that happened.

A. I was called upon to be examined; I was hired and set to work without being examined and the rules of this company is to examine all employees in regard to color-blindness and ability and all that, and I went down to be examined and Mr. Gilbert was not there and Mr. Finnigan didn't stay there, and he told me to come in the next morning, and Mr. Gilbert's clerk or some one in the office would examine me, and I went in and stood the examination so far as they went, until they came to some fine reading, and I couldn't see to read it without my glasses, and I told him then I couldn't see to read fine reading and hadn't been able to for the last ten or twelve years, and he took my glasses and tried them, and said there was but very little more strength to them than to his naked eye, and he could see with them as well as with his naked eye, but I could not see to read it without them and I was rejected on that account.

Q. What was said about the balance of your examination?

A. He said it was good.

Q. Have you ever been discharged or had any bad record in the thirty years you have been at work in this business?

A. I never have.

Q. I will ask you to look at this book (hands witness book of rules). Do you know if that is the book of rules of the Northern

Pacific Railroad Company in force for the government and guidance of its employees, and in force about the 7th of October, 1892?

95 A. I could not say whether this is the same book or not, but it is the book of rules of the Northern Pacific Railroad Company and one we did work under until 1891, but whether this is the book that was used at that time, or at this present time, I could not say.

Q. Look at this fly-leaf, or title page, that has fallen out, and refresh your memory, and see if this is not the book of rules that you were working under?

A. This book went into effect March 29th, 1891.

Q. And that is the book as I understand you.

A. I think more than likely it was.

Q. Now I will call your attention to rule 134, on page 32.

Mr. ALLEN: We will admit that that is the book of rules of the railroad company.

Mr. HYDE: We will identify the book now, and afterwards offer certain rules in evidence.

NARCISSE POIRIER, being first called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. CROTTY:

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. How old a man are you?

A. Thirty-five years of age.

Q. Where do you reside?

A. Spokane.

Q. Are you a married or unmarried man?

A. I am married.

Q. How much of a family have you?

96 A. Two children.

Q. What is your business or occupation, and what has it been?

A. Brakeman, switching and conductor.

Q. In the employ of railroad companies?

A. And yardmaster as well.

Q. How long have you been engaged in that service?

A. About thirteen years.

Q. Where did you first commence work for railroad companies?

A. In Canada.

Q. What time was that?

A. About thirteen years ago.

Q. Do you recollect with what company you were engaged?

A. That was with the government road; it is the Canadian Pacific today.

Q. How long were you employed by them?

A. I was there up to about five or six years ago.

Q. You were there until about five or six years ago?
A. Yes, sir.
Q. Then you were employed with that company for about seven years?
A. Six or seven years.
Q. In what different capacities?
A. Brakeman—at first I started on a section before I went braking, and then I was brakeman, and switchman and yardmaster.
Q. Have you any trade or calling other than that of a railroad man?
A. Before that I used to be at home. We had a store.
97 Q. You went to work for the railroad company at or about the age of twenty?
A. About.
Q. Have you engaged in any other calling or occupation during the last thirteen years?
A. Besides railroading?
Q. Yes; during the past thirteen years.
A. Yes, sir.
Q. What has been your principle business and occupation for the past thirteen years?
A. Railroad man; brakeman and switchman.
Q. You devoted your time to that business for what purpose?
A. That is the only thing I have been doing.
Q. For the purpose of supporting yourself and family?
A. Yes, sir.
Q. What wages were you in the habit of receiving; what was your employment worth?
A. In Canada I used to get about 45, and I got 60, and I got 75, and that was what I was getting at the last.
Q. During the time you have been engaged in that business what was your condition as to health and strength?
A. I do not know nothing the trouble with me.
Q. Were you a strong, healthy man during the last thirteen years?
A. Yes, sir.
Q. What generally was your weight?
A. I did not use to weigh myself every little while, but I have weighed about ten years ago 152.
98 Q. And what has been your varying weight for the past thirteen years up to the 7th day of last October?
A. About one hundred and forty or one hundred and forty-five.
Q. What is your weight at the present time?
A. One hundred and twenty-two with all my clothes on.
Q. What has been your condition as to health and strength since the 7th day of last October.
A. I have been trying several little things to pass away the time.
Q. What has been your condition as to health and strength?
A. Cannot do nothing.
Q. Where were you on or about the 7th day of October last?
A. That was the time I got hurt.

Q. Where were you?

A. I was about five miles this side of Kendrick?

Q. What business were you engaged in then?

A. I was middle brakeman.

Q. In the employ of what company?

A. The Northern Pacific Railroad Company, on the Palouse branch.

Q. State if you were injured about that time—state exactly what you know concerning that injury, where you were, and what you were doing.

A. It was about 12 o'clock at night, midnight, and they just stopped on the main line near a side track; we had orders to leave some cars there from the conductor; I had orders from the conductor to leave three flat cars, if I remember very well, and
99 we just stopped there, and I was on the flat cars, and I was just about getting ready, as near as I can remember, to go down between the cars, and the first thing I knew I was hit; I was like this on the end of the flat car, and the box car was here, getting ready to get down between the cars when it struck me right here (indicates on the side of the forehead). I went down on the bank about—I do not know—15 or 20 feet. When I came to my senses—the men picked me up—I was right in the rocks that came from the rock cut, and they helped me along up to the engine, and went in the caboose at night, and the next morning they put me on the passenger, and I came here.

Q. You are familiar with the duties of railroad brakemen?

A. First class at that time.

Q. Explain to the jury why it would have been necessary for you in discharging your duty to have gone between those cars.

A. To cut off the air.

Q. Explain to the jury what that is.

A. To cut off the air under the car is just like—this is the pipe that comes out, and here is the rubber hose, and they couple about here and right under the draw-bar; and you go like this between the cars, and you shut off the air on both sides, and cut off the hose, and that was where I was going to go right under there, and the wheels was just like this; when the train stopped I do not know how far it went ahead because I was throwed down, and I do not know anything about that; I do not know how far it went
100 ahead, but if it went far at all I would have been under the cars. That is all I know.

Q. How long had you stopped at this Clyde spur, and for what purpose did you stop?

A. I just said it,—it was to leave some flat cars, if I remember very well.

Q. Was the train that you were working with standing perfectly still?

A. I kind of think so, but I could not say that for sure. Maybe it was stopped a minute, or maybe two minutes.

Q. And when you were struck you were preparing to get down to uncouple the hose?

A. I could not even swear that I had the hose cut off next to the engine; that can be proved by others that were there.

Q. Explain to the jury what the effect of leaving that hose coupled in separating the train would have upon the train.

A It would have this effect, that the cars would stay right where they were.

Q. It was necessary to uncouple the hose and turn off the air supply?

A. Yes, sir; it was necessary to go under the cars to shut off the air; what is left between the cocks is just a little bit, and you open them.

Q. That is usually done before the coupling pin is pulled?

A. That is the orders and a part of your duty, because if you do not uncouple them like that they will break off sometimes.

101 Q. Where were you taken to—who in the first place discovered you after you were injured?

A. I do not remember that very well.

Q. How far were you hurled from the top of the car?

A. It was I said about fifteen or twenty feet.

Q. Do you know anything about the condition of the ground there?

A. I just told you it was all rocks that came out from a rock cut to make a dump.

Q. Do you know how long you had lain there before you were picked up?

A. No, sir, I do not.

Q. Where were you taken to?

A. On the engine, I think.

Q. Did you see any train following you when you went to uncouple this hose?

A. I did not know nothing about it.

Q. Did you have any knowledge that there was any train approaching in the rear?

A. No, sir, I was not notified.

Q. You were brought to this city?

A. On the next day.

Q. Who were you braking for then?

A. Conductor Samis.

Q. Do you know whether Mr. Samis had any knowledge that you were obliged to stop there at Clyde to do work?

A. It was him that told us to do the work; he was the conductor.

Q. Where was he when he told you that?

A. I do not remember that.

102 Q. But you stopped there to do that work in pursuance of his orders?

A. From the last place we had left we were all on the top of the cars setting the hand brakes.

Q. What is the condition of the road there as to grade?

A. It must be pretty heavy grade because with them big engines it is all they can pull is five loads.

Q. Do you know how it is designated by the company?

A. They call it mountain grade.

Q. Where did you go after this accident occurred—when you left here?

A. After I came here from the accident, I went to the hospital in Missoula.

Q. How long did you remain there?

A. About five weeks.

Q. What was your condition when you went there, as to health and strength?

A. I was getting afraid of myself; I was getting dizzy and nervous, and everything was moving around in my head and hurt me terribly bad, more than it did on the start after I got hurt, and I went to the hospital at Missoula and stayed there.

Q. When you went to the hospital at Missoula, were you suffering from any external injuries?

A. I was suffering from my inside.

Q. Did you have any injury to your head that was visible?

A. My head and my breath, I was pretty near going on two months; I could almost poison myself with my breath like
103 as if something was broken inside; even now I do not sleep very well at night, and while I was in the hospital—shall I tell what was going on there?

Q. State to the jury what condition your head was in when you went to the hospital from the time you were injured?

A. That is outside—it was swelled here up to my eyes, and this eye was almost blind, I could not see; it was red and blue and green and swollen, that is where I got struck.

Q. There was a lump on your head?

A. About the size of an egg.

Q. Is that lump still visible?

A. There it is right here. (Indicates the side of the forehead.)

Q. What was the size of that immediately after you regained consciousness after the injury—what was the size of the lump on your head?

A. Right away it got worse; after two or three days it began to hurt me worse, and I got afraid what was the matter with me.

Q. Do you suffer any pain from that lump now or is it sensitive to touch?

A. If I press on it like this there is a kind of a feeling goes right through inside of the top of my head and the least thing scares me, and I never used to be like that. Even to walk along the street, if a man comes up to me and asks me for money to eat.

Q. Prior to the 7th day of October last, were you in the possession of all your faculties, as hearing and seeing?

A. There was never nothing that bothered me.

Q. Were you possessed of good eyesight?

104 A. First class.

Q. And hearing?

A. Yes, sir.

Q. How have you been since the 7th day of October?

A. I left the hospital on the 1st of March, and about a month or

so after I came out of the hospital I could not hear quite well, but I begin to hear better than I did at that time to tell the truth, but up to that time I could not hear very well, or read. I never did read anything in the hospital, and up to quite a long while after I left it, I do not remember just exactly how much, but it would hurt my eyes and my head like if something catched me right in the back and followed it all through my head.

Q. What was your condition during the time you were in the hospital at Missoula?

A. When I was ordered to get out of the hospital I was awfully surprised. I told the doctor, I says, Doctor, I have my discharge to go, but I am awfully surprised that I have to go. I will tell you how I feel—so I told him.

Q. What did you tell him?

A. At the time I was in the hospital four or five weeks, the man that works in the hospital—there were four men, and they were playing on the floor like little boys do with a broom-stick, or something like that, and hit another with a knife, or something like that—some kind of a mean trick, and I looked at some of it, and I got so I could not stand it, and I walked away and began to feel kind of bad from it. I did not want to do any harm to myself, and I went to bed, and the next morning the boys told me, they says, You were foolish to go away so soon last night, we had lots of fun; but I said I could not help it; when I left I could see you had lots of fun, but I could not stand it to look at it, it was exciting me too much, and I went to bed. And another thing that happened to me there was a man that got shot; he was shot the same day that the banker's brother got killed there, and he went away and he came back, and the sister was very nice to me there, and when she came by I asked her who is that gentleman, and she says he is the man that got shot, and he is afraid to sleep upstairs, and that night I could not sleep at all. I was afraid somebody might shoot me, and I could not sleep, and I got up and I walked quite awhile that night with somebody; I think it was the night watchman, if I remember, but I could not say for sure. I told the sister the next morning, and she said, I am awfully sorry I said that, and I said I did not know myself that it was so bad as that, but I did not sleep at all and did not rest, and when anything does that to me everything hurts in my head like if you take and hit me with a stick of wood, or if I take an axe and try to chop wood, just to make a little jerk, it goes right up to my head and I cannot do that. I have been trying to do that for a pastime, and I cannot do that.

Q. How long were you in the hospital at Missoula?

A. Four or five weeks.

Q. What was your condition when you left there compared to your condition when you went there; tell all about it, and the circumstances under which you left there, and what induced you to leave there?

A. I started to tell it. The doctor sent me word and gave me a discharge, and I got it here in my pocket. That was

on the 15th of November, one month after, about, and he asked me I suppose you are all ready to go to work, and I says, I do not feel that way, Doctor, and that is all that I told him, just what I am telling you, but that was the way I felt, and he says, You may come around tomorrow, then—there is something else that I forget.

Q. Did you have any other conversation with him there in regard to your condition before you left there?

A. Oh, yes; he asked me how long I had worked for the company then, and I told him about three weeks. Oh, yes, he said, just what I expected. I do not know what he meant by that.

Q. What did he say, else, then?

A. I am trying to think of it now—after I will be out of here all by myself I do not know how I will be.

Q. Did he make any statement to you about how seriously you were injured?

A. I do not remember that very well.

Q. Do you remember any other talk you had with him in regard to your condition?

A. Next day?

Q. Any time.

A. The next day I came back. When I went to see him the first day, on the 15th, he had not seen me himself; the other doctor—I forget his name—was treating me there, and when this discharge came I had to go to the office, and I walked, and it was pretty cold, and it was about all I could do to walk to go there; and when
107 I came in I asked him if he would not be good enough to wait until tomorrow for to go, as I had some business with the Brotherhood of Railroad Trainmen, and that is where he questioned me, if I was all right to go to work, and I told him no. And the next day I went there with a friend, that was on the 16th the next day, and they examined me,—he told me the day before to come around tomorrow and he would examine me. And he examined me, and after he got through examining me, he told his doctor, or the other doctor, to write me out a pass, that it was all right, and I started to go out, and he called me back.

Q. Tell the jury what was said and what was done.

A. The night before when I was in the hospital there was a patient there that had an arm cut off or broke, I do not remember very well, and he was suffering pretty bad and wanted a doctor, and in the fix I was it was just the same as if it was my own brother. I felt sorry for the poor man, and I told these Brotherhood men the next day that it was too bad that one man was suffering in the hospital, and that they did not take care of him, and those Brotherhood men said, Oh, yes, we will; Dr. Buckley wants to be shaken up, or something like that. He is kind of slack, you know, with a patient once in a while, and so the next day he did shaken him up I guess, and when I went to leave the Dr. caught hold of me and scared the life out of me. He caught hold of me by the throat,—he did not choke me.

Q. What did he say?

A. If I remember well, he cursed. I would not like to curse.

Q. Tell everything that occurred there.

108 A. He says damn you, when he catched me.
Q. When you say him, who do you have reference to?
A. Dr. Buckley.
Q. Who else was present?
A. He showed me the fist like that.
Q. Who else was there?
A. The other doctor, that is all.
Q. Nobody else?
A. I had a friend, a Brotherhood friend there, and the doctor asked him if he had no objection to go and leave me alone there.
Q. At the time Dr. Buckley did this, you and he were alone?
A. The other doctor was there.
Q. Do you know what Dr. Buckley's business was there?
A. They called him the head doctor.
Q. Had he at any time during the time you were in the hospital made an examination of you, of your condition, or treated you?
A. No, sir; I do not remember that.
Q. When did you first recollect having seen him, and how long had you been in the hospital when you saw him?
A. He is away a great deal of the time on business. I do not know anything about that, but the other doctor is the doctor who was doctoring me; Doctor —— I cannot think of his name,—he is the assistant anyhow.
Q. What has been your condition since October 7, 1892, as to your memory of events, and as to impressions, and the effect
109 that a sudden fright would have upon you, as compared to your condition before that time?
A. Sometimes I can talk pretty fair, and other days I do not know where I am; I am not the same.
Q. State to the jury whether or not you are in such a condition that you are able to do any manual labor of any kind?
A. Not as long as the doctors cannot do me any good better than what they have done. I have had the best doctor in town, Dr. Harvey, and I had lots of confidence in him, and I have yet.
Q. What has been your condition since the 7th day of October, 1892,—have you improved any?
A. I have improved a good deal since I came out of the hospital here, but when I came out of the hospital here I weighed 124 pounds.
Q. How long were you in the hospital here?
A. About three months.
Q. What hospital was that?
A. The Sisters' hospital.
Q. What hospital were you in in Missoula?
A. The Sisters' hospital.
Q. Do you know under whose direction it is run,—who were you sent there by?
A. By the railroad company.
Q. Do you know whether that is the railroad hospital or not?
A. Mr. Gilbert is the man that sent me,—the superintendent.

Q. Do you know whether the hospital at Missoula is a railroad hospital?

110 A. The other one was burned at that time,—the railroad hospital was burned.

Q. You were there as a patient of the railroad company?

A. Yes, sir.

Q. Do you know what position Dr. Buckley sustained to the Northern Pacific Railroad Company, is he a surgeon of theirs?

A. He is the head doctor of the Northern Pacific, and the other doctor under him was the assistant.

Q. Since your injury have you been under medical treatment?

A. All the time.

Q. And are you at the present time?

A. Yes, sir.

Q. When you came back, under whose medical treatment have you been since that time, that is, medical treatment,—who has treated you?

A. Dr. Harvey.

Q. After you had left Missoula and returned to Spokane, had you noticed any improvement in your condition?

A. Since I left Missoula?

Q. Yes.

A. Well I was pretty bad here after I came here.

Q. What induced you to go to Dr. Harvey, was it on account of your physical condition and your sickness?

A. Yes, it was through my sickness, and he doctored me in the hospital, and is doctoring me yet whenever I feel anything that don't go right with me, that is not working right in my inside or other ways, in my head, or something like that, or don't sleep

111 well at night, or get scared, or if a horse runs away it frightens me, or even the fire department. I cannot go to the Comique or anything like that. I have always got to keep quiet. The best place I could be would be on a farm, I guess.

Q. Did you see Dr. Harvey before you went to the hospital at Missoula?

A. Yes, sir.

Q. At whose suggestion did you go to the hospital?

A. Dr. Harvey.

Q. When you returned from Missoula what induced you to go to Dr. Harvey?

A. He was the best doctor, I thought.

Q. Was it because of your sick condition?

A. I could not do nothing after I left the hospital there, I was not fit to walk around.

Q. Or was it because of dissatisfaction with the treatment you had at the hospital at Missoula?

A. When I was sent out there I just said to myself like this, now maybe I think myself more sick than what I am. Sometimes a man will think he is sick when he is not, and I thought that. I do not want to say nothing about Dr. Buckley, and stayed in the hospital until he put me out, and I was here about three weeks in the hotel

and I fell on the stove here; I got dizzy and lost my mind and fell on the stove and burned my forehead, and that was *on* March; I do not know what made me fall there, but I fell and nobody pushed me.

Q. Are you subject to spells of dizziness?
A. Yes, since I got hurt I have been that way.
Q. Did you ever notice anything of that kind prior to the 7th day of October, 1892?

112 A. No, sir, because I was braking on the Great Northern last summer, and it is a pretty hard road to brake on, and we had to brake by hand, there is no air, and it takes a pretty strong man not afraid of anything around the curves, and cuts, and tunnels, and I used to do my work first class and now I cannot. And another time in the Columbia hotel, I was stopping there, in the afternoon, I think it was on Sunday, there were two of my friends came to see me, Brotherhood boys, and I had just felt pretty mean with my head and I laid down. I was feeling pretty mean with my head; it was not like the headache. I have had headaches before and since, but these pains are different altogether. It is like everything in my head is coming down and pulling and hitting me. And they said, You are taking a rest, and I said, Yes, I was not feeling good and I had to lay down, and a few days after that a little bit of a child about that big, 5 or 6 years old, scared me. It was a little girl, and she said I will go and get my gun and shoot you.

Q. How long were you confined in the Sacred Heart hospital here?
A. About three months.

Cross-examination by Judge McBRIDE:

Q. How old did you say you were?
A. 33 years of age.
Q. Where were you born?
A. In Canada.
Q. When did you first come to the United States?
A. About 5 or 6 years ago.
Q. What work did you do when you were a boy?

113 A. I was at home at the time.
Q. In town, or did you live on a farm?
A. My father was keeping a store. I was going to school only at last before I went to railroading.
Q. Were you brought up to any kind of business?
A. I worked in the store with my father.
Q. Did you keep books?
A. Oh, no.
Q. Were you salesman?
A. Yes, I drove a wagon.
Q. How old were you when you went to railroading?
A. About 20,—about 13 years now.
Q. You are a married man, I believe?
A. Yes.

Q. How long since?
A. Six years, over.
Q. Were you married in this country?
A. Married in Canada.
Q. Where did you first work in the United States?
A. In Michigan, that is where I took my papers as a citizen of the United States.
Q. When did you first come out West?
A. Last summer.
Q. A year ago last summer?
A. Not this summer, last year, before I got hurt.
Q. Where did you work first?
A. I came from Great Falls when I came here.
Q. Did you work on the railroad there?
A. I was switching there, about ten months or a year.
Q. On what road?
A. On the Great Northern.
114 Q. You came from Great Falls to work on the Northern Pacific?
A. Yes, after I worked here; I worked here on the Great Northern.
Q. Have you ever been in any other railroad wreck?
A. I was in a railroad wreck,—I came here last summer, and the summer before that there was no wreck to my knowledge, but the summer before that, that is three years ago, on the Duluth & Iron Range road——
Q. Whereabouts?
A. That is north of Duluth on the Duluth & Iron Range, I was switching there—I told a mistake there. The first summer I was there anyhow I switched and I broke; that is the same summer that the wreck happened before I went switching, that same summer the train ran in sections, there were 4 or 5 sections, and the man that was following us——
Q. Have you been in a railroad wreck before?
A. There was a wreck there.
Q. How long before this one?
A. About 2 or 3 years ago.
Q. Was there any other wreck that you were ever in?
A. No.
Q. You never were on a train when there was any other wreck except that one?
A. I do not remember, but there was nobody hurt there.
Q. Were you ever hurt on a railroad train before?
A. No, sir.
Q. This was the first time you were hurt?
A. No, I was hurt on the same road on the 17th day of March.
115 Q. On what road?
A. On the Duluth & Iron Range. I cut my hand jumping through a window. They shoved the cars right through the freight shed. There were three in there.

Q. When was that?

A. That was on that same road, a couple of years ago, 1882 or 1883—I do not know for sure. I do not want to tell the truth on that because I am not positive.

Q. Were you hurt at that time?

A. Yes, I had this finger hurt when I jumped through the window.

Q. Was that the only wreck you were ever in?

A. I had this finger pinched in Canada too, and that is all.

Q. Then you have been hurt twice?

A. Yes, I had this finger pinched in coupling cars.

Q. That occurred in Canada?

A. Yes.

Q. Then you have been in another wreck beside?

A. Yes, but I did not get hurt in that wreck.

Q. Was anybody hurt?

A. No, sir, nobody was hurt.

Q. Was anybody else hurt at the same time you were down on the Palouse road?

A. I do not know; the time I got struck, that is the last I know.

Q. How long had you been at work at the time that you were hurt?

A. About two or three weeks.

Q. How many trips had you made?

116 A. I do not know for a fact. I worked for Mr. Samis. I do not know how many trips I made with him, 2 or 3. I do not know for a fact, and before with another conductor there, I cannot think of his name; he has got his nose broke—Mr. Bates.

Q. You made one trip with him?

A. One or two.

Q. Was not this your third trip when you got hurt?

A. It was.

Q. It was your third trip?

A. No, I think I made a couple of trips for Mr. Bates, or one, and Mr. Samis, and there was another conductor that I worked with before that. I do not remember how many trips I made with him, but I think only one, and Mr. Samis two or three trips, and that is the time I was hurt. I was there about two or three weeks. I just came from the Great Northern then.

Q. How long since you quit work on the Great Northern before you began work on the Northern Pacific?

A. The same day that Mr. Kilduff got killed I *felt* the Great Northern; I left the same morning, and in the afternoon I met Mr. Burdick and he offered me a job, and the next day I went to work.

Q. You quit one road one day and went to work for the other on the next?

A. Yes.

Q. How long had you been at work on the Great Northern?

A. I left Great Falls in June.

Q. How long had you been at work there?

117 A. From the time I left Great Falls I worked up until the time I got hurt.

Q. Where did you work on the Great Northern?

A. I broke at Kalispel.

Q. Which direction?

A. This way, and the other way too.

Q. Did you have any trouble with the Great Northern road between the time you were at work there on the trains?

A. I don't remember.

Q. Was there not train trouble there?

A. I don't remember of any.

Q. There were no wrecks while you were on it?

A. No sir, not that I remember of.

Q. Why did you leave the Great Northern?

A. I left in the morning at seven.

Q. Why did you leave it?

A. Because we could not agree; the foreman and I and the other boy, we could not agree and we left.

Q. Was it not because you were afraid to work on that road?

A. Oh no, I never was afraid when I was in good health. It was because we could not agree. They were working twelve hours,—good long days.

Q. How long according to your recollection had your train been stopped at Clyde station when the other train came up?

A. Maybe one minute or maybe two minutes.

Q. Were you out on the cars, standing on the platform of the car, at the time that you arrived at the station?

A. I do not know that.

118 Q. When you got to the station, where were you?

A. Maybe I was on the box car, but when this accident happened I was on the flat.

Q. Where were you at the time the cars stopped at station?

A. I do not remember.

Q. Why don't you remember?

A. I could not tell.

Q. Do you remember what you did when you went to uncouple the car or where you went from?

A. I do not know that I did uncouple the car at all.

Q. But you did go to uncouple?

A. I don't remember that.

Q. Did not you state that you were going and stooping down?

A. I did not go under the cars to uncouple them.

Q. But you were standing on the flat car?

A. Yes, sir.

Q. And went to uncouple it,—that is what you were there for?

A. Yes. I was there to go and uncouple it, and to do my work, but I was not under the train.

Q. You were standing on the flat car?

A. Yes.

Q. And you were going to uncouple the car?

A. I was going to go down to uncouple the car.

Q. Where did you go from?
A. From the flat.
Q. Were you on the flat car when you got there?
A. When I got struck?
Q. No,—when the train stopped?
A. I do not remember that.
119 Q. Do you remember where you were?
A. I remember where I was when I was struck, to do my work, but what I mean to tell you is that I cannot swear that I was on top of the box car to set the brakes, or on the flat—I don't remember that, but when I was struck I was on the flat.
Q. Do you remember when you left Vollmer?
A. No, sir.
Q. Do you remember leaving there at all?
A. Oh, of course.
Q. Then you remember that you left there?
A. I remember that I left there.
Q. How did you ride down until you come to Clyde station?
A. On the cars.
Q. On the box car or on the flat car?
A. That is what I tell you I don't remember, whether it was on the box or flat.
Q. Why cannot you remember?
A. I cannot tell anything that I do not remember.
Q. Was your memory good?
A. It is not very good now.
Q. You do not recollect then whether you were on the flat car or on the box car?
A. No, sir.
Q. You don't know whether you got off of the box car and got on the flat car to uncouple it?
A. There were three flats next to the engine.
Q. If you don't remember that, how do you remember where you were at the time you were struck?
A. That is where I was getting ready to do my work; I
120 can remember the last thing I did, and that is all. There are some things that I can remember, and other things that I cannot, and since it is the same. That is what is funny about me.
Q. Did anybody order you to get down and uncouple that car?
A. Did anybody tell me?
Q. Yes.
A. Oh, no.
Q. You went without direction?
A. I do not know if I did uncouple the cars.
Q. Did anybody direct you to do it?
A. It was my work.
Q. Did anybody direct you to do it?
A. I did not see nobody around there; we had orders to leave the flats, and I knew what I had to do. One man has so much to do, and the head brakeman goes to the switch.

Q. Had you seen the conductor from the time you left Vollmer at all?

A. No, I cannot tell that for the truth.

Q. Then if you did not speak to him, then he did not tell you, except it was at Vollmer?

A. I don't recollect that.

Q. Do you recollect who told you they were to drop the cars at Clyde?

A. I cannot say that either.

Q. But you remember that they were to drop the cars there?

A. Yes.

Q. And that is the reason why you were there on the flat car?

A. Yes.

121 Q. Did you see that other train coming up at all?

A. No, sir.

Q. Did you hear it?

A. No, sir.

Q. You say your hearing and sight were both good at that time—if the other train had blown a whistle or rung the bell, would you have heard it?

A. I believe so.

Q. Was this a regular train, or an extra train?

A. The train I was braking on was the regular train and runs every day.

Q. Do you recollect seeing the other train at Vollmer?

A. No, I do not remember that.

Q. You did not see the other train?

A. I do not remember.

Q. This was the regular freight train—what did it do—pick up cars and drop them in different localities?

A. Yes, and unload freight. We were working pretty hard at that time, I remember that all right.

Q. Do you recollect whether these cars were loaded or unloaded?

A. The flat cars?

Q. Yes.

A. They were empty flat cars, if I remember to my best.

Q. Do you recollect whether the other cars were loaded or not?

A. The box cars? I do not know if they were all loaded.

Q. Do you know how far it is from Vollmer, the last place you stopped, to Clyde, the place where you stopped at the time the accident occurred?

122 A. About five miles I think.

Q. Do you recollect anything about the rate of speed at which you run?

A. No, sir, I do not remember that.

Q. Was it fast or slow?

A. We were on top of the cars steadying the train to the best of my knowledge.

Q. Was it unusually fast or unusually slow?

A. I don't remember that.

Q. Was there anything remarkable about the way the train run?

A. Not that I know.

Q. If it had been going very fast or unusually fast you would have noticed it?

A. If we were running very fast we would have went by the station, because it is a pretty hard hill, but I do not recollect that.

Q. But you stopped right—do you recollect seeing Tinling go down to the switch when you stopped?

A. I could not say that.

Q. Did you see any one when you stopped at all?

A. I must have seen everybody I think, but I do not remember.

Q. Do you recollect of seeing any one at the time you stopped there?

A. No, I do not recollect that.

Q. Do you recollect of any one speaking to you?

A. Not until after I was picked up.

Q. I mean at the time you stopped?

A. No, I don't remember that.

Q. When did you recollect of seeing anybody at the place of the accident?

123 A. On top of the train.

Q. When—before the accident or afterwards?

A. Before the accident.

Q. Who did you see there?

A. Mr. Allen.

Q. What was he doing?

A. He was riding on top there, setting the brakes when they were needed.

Q. When you saw him there, where were you?

A. I was on the box cars then.

Q. Were the cars stopped and standing?

A. That is when they were moving.

Q. Before you got to the switch?

A. Yes, sir.

Q. Did you see him after you got to the switch on top of the car?

A. I saw him after they picked me up, I believe.

Q. After you got to the switch, and before the accident, did you see him on top of the car?

A. I do not remember that.

Q. Did you hear him hail anybody or holler?

A. No, sir.

Q. Did you see him swing his lamp?

A. No, sir.

Q. What was the first notice you had of this collision?

A. When I went down—I got struck and I went down.

Q. The first you knew of the other train there was when you received the blow on the head?

A. I did not know that it was a train struck us—I did not know.

124 Q. Who picked you up?

A. I don't remember that very well. Mr. Tinling, I think, or Mr. Allen, or maybe there were two or three.

Q. Did they carry you, or did you walk from the place where you were found?

A. I don't recollect that.

Q. Did you have any conversation with any one there, telling them how you were hurt, or anything about it?

A. I don't remember, I was pretty quiet I guess.

Q. You do not recollect whether you walked to the engine or was carried?

A. No, sir.

Q. Do you recollect who was in charge of the engine?

A. I do not know the man if I would see him now, I don't think.

Q. Did you know him at that time?

A. We had left here, and I used to see him on the road all the way along, and he was a pretty nice man—all right.

Q. Did you have any talk with him as you went down?

A. I don't remember that.

Q. Did you think you were hurt much that night?

A. I felt very glad, when I was picked up amongst the rocks, that I was alive.

Q. Were you insensible?

A. When I was picked up I was, yes, but I don't know how long I was.

Q. Where did you go that night?

A. In the caboose.

125 Q. Where did you go from there, did you sleep in the caboose?

A. I believe so as near as I can remember.

Q. Did you have a boarding place there at Kendrick?

A. We used to eat there, that is all.

Q. You used to sleep in the caboose?

A. Yes, sir.

Q. You slept in the caboose?

A. Yes, sir.

Q. Where did you go the next day?

A. I came to Spokane.

Q. At whose suggestion did you come, your own?

A. I do not know; I had a pass; somebody gave me a pass; I don't remember who gave me the pass, to tell the truth.

Q. Did you come back on the freight the next morning?

A. I came on the passenger.

Q. Who told you to come?

A. I don't remember, somebody gave me a pass, I could not swear who did give me a pass there, I don't remember that.

Q. Did you ask for it?

A. I don't know.. I was in such a bad shape that the conductor must have got a pass I guess.

Q. You don't recollect about it?

A. No, I cannot swear to that.

Q. What did you do when you got to Spokane?

A. I was boarding at the Grand Central at the time, and I stayed there three days—two or three days and then I was getting worse

right along and pains in my head and all over my body and
126 side and in my hips and if I remember very well I was scratched, or my flesh torn a little, but I had no legs broken and when I got worse, I saw Dr. Harvey and he told me I should go to the hospital.

Q. Under his advise, you went to Missoula?

A. Yes.

Q. How long were you here in this city before you went to the hospital?

A. I was hurt on the 7th and I came here the next day, on the 8th.

Q. How long did you stay here before you went to Missoula?

A. I left here on the 12th.

Q. You went to Missoula from here on the 12th?

A. Yes, sir.

Q. How long did you stay in the hospital at Missoula?

A. Four or five weeks—I left there on the 16th.

Q. You say you were there four or five weeks?

A. Yes, sir.

Q. Did I understand you to say you had a certificate showing when you were discharged?

A. Yes, sir.

Q. Let me see it. (Witness produces certificate of discharge.) You say you had always been a man in good health, prior to that date?

A. Yes, sir.

Q. Had these wrecks affected you any?

A. I was never afraid to do my duty.

Q. And you have been afraid since?

A. I am scared all the time now.

Q. Is that the principal trouble?

127 A. Pains in my head, and I am sore here all the time and in the knees and down in the ankles and under this foot mostly.

Q. You don't insist that you were hurt at that time in your legs, and ankles and about your knees?

A. No sir, not to amount to anything, it was mostly here. (Indicates his head.)

Q. Was there anything which gave you any annoyance, except the hurt in the sides of the head at that time?

A. I have been feeling sore in my insides, but I don't remember very well, whether I was sore or bruised or hurt. The doctor remembers it but I cannot tell that for a fact.

Q. You came back and Dr. Harvey examined you soon after you were hurt?

A. About three days afterwards, because I was feeling the pain worse.

Q. What have you been doing this summer; you were discharged some time in March or April from the hospital?

A. I have been supported by my friends.

Q. What have you been doing?

A Nothing. I cannot do nothing. I cannot trust myself to work for nobody.

Q. You have not been trying to do anything?

A. I have been trying two or three times.

Q. What have you been trying to do?

A. After I left the hospital I was boarding and I often tried to split wood, just for a pastime, and it would hurt inside of my head and if I would just give a jerk, it goes throught my throat
128 and through my head. If I am quiet and walking along and nobody comes to bother me or anything, I can walk along and I rest pretty good that night, but lots of nights I don't rest well yet. And another time I was driving with this same man where I am boarding, and his hired man, and that was quite a while after, when I thought I had lots of strength and I had improved a good deal and we were up on Howard street gathering up some grass and when they brought the horses around they got scared and I almost choked myself to death.

Q. Prior to that, you thought you could go to work?

A. I thought I could help the man for a pastime. It is pretty long for a man to be in this shape and cannot work.

Q. When did you bring this suit?

A. After I came back from Missoula; I would not say for sure whether that was the time I was in the hospital, or before. I don't recollect.

Q. It was before you went into the hospital, or was it not?

A. I don't recollect that very well.

Q. Didn't you have a little controversy with the doctor at Missoula; you were not pleased when you were turned out of the hospital?

A. I told him that I was surprised that he gave me the discharge.

Q. Didn't you tell him that you did not want to go?

A. I didn't say that I did not want to go. I told him I didn't feel well enough to go.

Q. Didn't you threaten to bring a suit against the company at that time?

A. No sir; not that I remember.

129 Q. Didn't you say that you and your brotherhood, or some association that you belonged to, intended to have redress?

A. No, sir; I don't recollect that.

Q. I ask you whether you didn't say so—didn't you have a brotherhood that you belonged to over there?

A. Yes, sir.

Q. Do you recollect whether you said anything about what they told you that you could do, that you could recover against the company?

A. No, sir. I got some money that came there for me; that is all the talk.

Q. You do not remember threatening there that you would bring such an action if they turned you out of the hospital?

A. No, sir; because when I left there I thought I might be better than what I expected.

Q. You didn't know but what you might be mistaken?
A. Yes, sir.
Q. How long was it after you got here before you went into the hospital?
A. About three weeks.
Q. Did you bring your suit before you went to the hospital?
A. I don't remember that very well.
Q. Did you go to a lawyer, or did one come to you?
A. I don't recollect that.
Q. You don't recollect going to a lawyer at all?
A. I don't recollect how the bargain was made there.
Q. I want to know how you came to conclude to bring the suit?
130 A. I don't remember that.
Q. You don't recollect at all what induced you to bring the suit?
A. No, sir.
Q. When did you conclude in your own mind that somebody was to blame for your being hurt besides yourself?
A. I had been thinking more to get in my health than anything. I don't remember anything else.
Q. But you brought a suit here for $25,000, and I want to know when you thought you were hurt that much?
A. I don't know when; I don't know whether it was before I went to the hospital or after I went there. There is lots of things I remember before, and other things that I don't remember.
Q. Did you bring this suit or did you tell anybody to do it?
A. Yes; I told Mr. Crotty.
Q. You don't remember anything about when?
A. No; I don't remember when.
Q. Did you make a statement of your case to him?
A. Yes, sir; a statement of how I was hurt.
Q. You told him about it?
A. Yes, sir.
Q. Did you tell him who the witnesses were?
A. I don't remember that.
Q. Did you make any inquiries to find out who knew the facts?
A. I never went around for anybody.
Q. You never did any of this business?
A. No, sir.
131 Q. Did you have any conference with Mr. Allen, who was on the stand?
A. I have seen him a little.
Q. Did you have any talk with him about your case?
A. Yes, sir.
Q. Did he tell you that you could bring a suit?
A. The suit was in at the time.
Q. The suit was brought before you had any talk?
A. Yes.
Q. Who did you talk with about bringing the suit, prior to when it was brought?

A. I cannot tell that.
Q. Did you talk with Mr. Crotty, your attorney here?
A. Yes, I think he is the man I gave the suit to.
Q. Did you talk with Mr. Hyde?
A. Mr. Crotty was the first one.
Q. Anybody else but him?
A. I don't remember.
Q. Did you talk with Mr. Reagan?
A. No, I don't remember that. Mr. Crotty was the man I talked at the first with.
Q. He was the attorney you first employed?
A. Yes, sir.
Q. When did you make up your own mind that you had been injured to the amount of $25,000?
A. That's when the papers were made.
Q. That is when you made up your mind?
A. That is all I remember. At that time I was always thinking more for my health than anything.
Q. You had been over this road three or four times at least before, from Vollmer to Kendrick?
A. For two or three weeks.
132 Q. As many as three or four times?
A. That would be more than that I think; five or six times.
Q. Did you go every trip?
A. I went two or three trips.
Q. You were with the regular train and you made your regular trip as a brakeman over that road during the time you were there?
A. Yes, sir.
Q. You were acquainted with the kind of track it was, and the grade?
A. Yes, sir.
Q. Did you know that it was a mountain grade?
Q. That is the first thing that a strange brakeman enquires, where is the big hills.
Q. Did you know the character of that grade at that time?
A. I learned it the first night and the second time I went over it I knew it.
Q. You were not expecting any train to come up behind you there?
A. No, sir.
Q. You did not know that any was there?
A. No, sir.
Q. Were you acquainted with these rules that the counsel has put in here—the rules that govern the running of the trains on the road—the regulation of the company?
A. Yes.
Q. Had you read those rules?
A. I don't remember that. There were no rules given to me that I can remember.

133 Q. Are not all brakemen required to make themselves acquainted with the running rules of the company?
A. Yes sir.
Q. You understood that?
A. Yes.
Q. And if you didn't know what these rules were, you were assumed to know—it was understood that you did?
A. Yes.
Q. And you undertook as a brakeman that you would observe the rules of the company, so far as you were concerned?
A. Yes.
Q. You knew that it had rules?
A. Oh, all railroads have rules.
Q. And you knew what were the rules that generally governed brakemen, switchmen and conductors?
A. Yes sir.
Q. And you knew what the position of the brakemen, conductors and switchmen are?
A. I don't think I remember all of them now, but I used to all right.
Q. You knew at the time of this accident?
A. The conductor at the time I was braking for, and all of them can tell you that.
Q. You told us that you fell over a stove in a giddy spell?
A. That was in the Albion hotel.
Q. Was that a spell that you had?
A. I don't know how it happened. I felt like something went through my head like it was a spell.
Q. Had you been taking any medicine and been treated by some physician?
134 A. That was after I came back from Missoula. I was just about able to walk around.
Q. You were taking treatment and medicine at that time?
A. Yes.
Q. You don't know what it was that you had been taking?
A. I do not know; Dr. Harvey was my doctor.
Q. It may have been the medicine?
A. I fell on the stove, and I burned my head.
Q. Are you taking medicine now?
A. Yes.
Q. Have you taken any today?
A. No sir—I took some this morning.
Q. Do you know what it was?
A. Dr. Harvey prescribed it for me.
Q. Do you know what the medicine was?
A. It is red medicine.
Q. That's all you know about it?
A. That's all I know.
Q. What do you attribute your present condition to—what is the cause of your being in the condition you are in now?
A. I never was like this before. I think it is a very bad way to

be. On my oath I cannot trust myself to give satisfaction to anybody.

Redirect examination by Mr. CROTTY:

Q. Mr. Poirier, you testified that prior to the 7th day of October last, you were in two railroad wrecks; you were present at two railroad accidents?

135 A. Yes, not on this road.

Q. State to the jury what injury you sustained, if any, in either of those.

A. The first accident I had, that was about eight or ten years ago. I don't remember the date, I had a finger pinched by the pin.

Q. Show the finger to the jury.

A. I had this here cut. (Witness shows finger to the jury.)

Q. How was that cut, by glass, or how?

A. I was in the freight shed, of the Duluth and Iron Range, and the brakemen was doing their own switching and they switched the cars too hard and they came right through the freight-house. I was in a little bit of a room and I didn't have time to look up to see what was the noise; I jumped through the window. It was a big pane of glass and there were two engineers in there, and they were great friends of mine, and they got caught and when I jumped through the window, I was smallest and was first.

Q. You suffered no injuries from the injury to that finger?

A. No, sir.

Q. You were the middle brakeman on that train?

A. Yes.

Q. Is it not the duty of the middle brakeman to carry the switch-key and receive the direction as to where the cars are to be set out and picked up?

A. Yes, sir.

Q. And you were acting in that capacity and under the orders of this conductor at the time this accident occurred?

136 A. The conductor runs the train.

Q. What relation does the middle brakeman bear to the conductor of the train, as to setting out and picking up cars and loading and unloading freight?

A. I cannot think of all that now, I used to know that.

Q. Is the middle man accustomed to carry the switch-list?

A. Yes.

Q. Who makes out that list for him?

A. The conductor.

Q. And the switch-list you had was made out by the conductor of the train that you were braking?

A. Yes, sir.

Q. And you were setting out these cars in pursuance of the directions of that list?

A. Yes, but I do not know who gave me the list, who told me, I cannot swear to that.

Q. But it is the duty of the conductor to make out that list?

A. Yes, sir. He is over the engineer and everything.

Q. Did you ever have a book of rules of the company?
A. No, sir.
Q. Do they furnish books of rules to the brakemen?
A. Every railroad is supposed to.
Q. Do you know whether the Northern Pacific furnishes them?
A. I do not know.
Q. Did they ever furnish you with one?
A. I never say one.

137 Q. When you first went into their employ, did they furnish you with any book, or set of instructions?
A. Not that I remember.
Q. Do you remember when you first met me in relation to your case?
A. I don't remember that very well I don't know if it was after I was in the hospital.
Q. Don't you recollect a man named Marcus bringing you to my office one day when you first saw me in relation to your case?
A. Marcus—yes, I remember that.
Q. Do you remember the time you came to my office?
A. Yes.

J. J. ALLEN recalled in behalf of plaintiff.

Direct examination by Mr. HYDE:

Q. I want to ask you whether the conductor of your train, Samis, knew that there was a train following?
A. I believe I stated here that he did.
Q. How do you know that; or what said or done?
A. They came up behind us there at Moscow, and we were across there switching, and I asked him, what was that coming there——

Defendant's counsel objected to the witness testifying to the conversation.

Mr. HYDE: We think we can prove knowledge of the conductor in that way.

The COURT: I will sustain the objection because it is not
138 necessary to repeat the words if it was known, and he knows it and the matter was spoken of; that proves it enough.

Q. You know that he knew that the train was there?
A. I do.

Cross-examination by Mr. ALLEN:

Q. Did you know that the train was standing at Vollmer when you left?
A. I knew that there was a train standing at Vollmer when we left.
Q. You saw it leave Vollmer?
A. No sir, I saw it standing there.
Q. You didn't see it leave?
A. No sir.

Q. And you don't know whether he saw it leave or not?
A. I do not know that he did.

Question by Mr. HYDE:

Q. How do you know, that he knew it was there?
A. He saw it and was talking about it.

Dr. R. S. HARVEY, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. HYDE:

Q. State to the reporter your name, age, and place of residence?
A. R. S. Harvey, 44 years of age, Spokane.
Q. What is your occupation and profession?
A. That of medicine and surgery.
Q. How long have you practiced medicine and surgery?
139 A. Twenty-one years.
Q. Where did you study medicine and surgery?
A. At Cincinnati, Baltimore, and New York city.
Q. In what medical schools of medicine and surgery?
A. The allopathic profession. I graduated in the Washington University, and in the medical department at Baltimore, and regraduated at Bellevue, New York.
—. What certificates have you from these institutions?
A. I have one from Baltimore, and one from New York, or had before they were burned up.
Q. How long have you practiced in this city?
A. Four years and a half.
Q. I will ask you if you know this plaintiff, Poirier?
A. I do.
Q. When did he first call upon you?
A. On or about the 10th of October last.
Q. I wish you would tell the jury in what physical condition you found him, especially as to strength and weight, and as to any bruises or wounds, if you saw them, and if you did examine him at that time?
A. On the occasion of my first seeing him I made a careful examination of him, and I found on the external part of his head a swollen condition surrounded with a reddened, bruised margin; the tumified swelling that I discovered had no external indication of abrasion, although raised above the surface. He complained of soreness in his head at the time, and evidently was suffering from pain. I examined him also as to the other parts of his body, and found nothing other than he complained of being sore and bruised through his body.
Q. Explain where that was located?
140 A. In front of the temple, about midway of the forehead.
Q. How large was the swelling there?
A. The swelling proper, as near as I can recall it, was about two or two and a half inches in length, with possibly an elevated width of about an inch.

Q. The examination was all that happened at that time?

A. Yes; about all that happended at that time.

Q. You did not treat him?

A. I treated him; yes; to give him something to relieve his pain and move his bowels, and get him into condition for a further examination.

Q. Tell us all you did about the case, and what advice you gave him?

A. I only attended the case the first time. I saw him at two different times. After listening to his history as to the alleged cause of the trouble I suspected, and from all indications I thought, he must have some internal trouble of the brain, or internal plate or linings of the skull or brain; from the pain as he described it I thought there was either an injured condition or concussion, and anticipated in my own mind that possibly an abscess might form. He did not get any better for a few days, but remained in about the same condition; meantime he informed me about his position, and I advised him that the best thing—thinking that he would be ill for some time—was to go to his own hospital in a day or two or three days after I first saw him.

Q. Do you remember whether you took his temperature?

141 A. I did; I made all the little details of the examination, as to taking his temperature and circulation, and I found, which partially corroborated my suspicion, that his brain was injured, and that he had a fevered condition. His temperature was above the normal condition, and his pulse was more rapid than normal, and his condition indicated an injured condition of the physical body.

Q. Explain to the jury what is the natural temperature of the human body.

A. 98¼ or ½ degrees.

Q. Do you remember what his was at that time?

A. I don't remember exactly the degree, but at first it was about 103, showing a decided increase and irregularity at all times, with the exception of a few times I found it below or less than normal. That was after he came back, but at the first time it was always accelerated.

Q. When were you consulted by him again?

A. It was a few weeks afterwards; I cannot remember exactly the time or date; probably four or five or six weeks, and he told me he had been to Missoula and he came to me the second time.

Q. What was his condition then?

A. I found his condition about the same and his symptoms, so far as the pain was concerned, it was not so acute as at first.

Q. That was probably March or April that he came back?

A. He was here in October—no, it was previous to March I presume, but it was a few weeks after I first saw him. It was during the winter some time.

142 Q. I wish you would go to work and explain to the jury—narrate to the jury what his condition has been from that

time to the present—you have seen him since that time and treated him?

A. Yes, sir.

Q. And made careful examination of him?

A. Yes, sir.

Q. Proceed in your own way and tell what his condition has been.

A. From the first he complained around that portion of the brain of a certain soreness, and his symptoms and conditions led me to believe beyond the possibility of doubt that there was some injury of the inside of the skull. His irregularity of temperature, as well as his physical emaciation, the condition of his bowels and kidneys, a difficulty of passing water, and all that indicated, beyond a possibility of doubt in my mind, that he was suffering from some brain injury received from some outside cause. That is about all I observed, and they continued to increase, but the local symptoms diminished, but they were always more or less present. There seemed to be a diminution of strength and irregularities of the mind, and various other physical conditions kept increasing and coming on at irregular times, such as constipation of the bowels, and fear and mental fright, that would ensue from physical injury to the brain or spine.

Q. Will you explain to the jury what tests you have put him to to show his nervous condition?

A. I put him to a good many tests to ascertain as to the true condition; there are various ways of doing it, from symptoms
143 that you see and appreciate and understand, and others that you do not see; by these various manifestations I satisfied myself in my own mind that the man was suffering from some lesion of the brain that would seem to be extended to the cord itself. He exhibits that in many ways, both mentally and physically. As to his uncertainty of motion and walking, and various little detailed physical conditions, those I ascertained in a series of examinations.

Q. I would like to have you take some of these works and show the jury the brain, and explain it to them. (Shows witness copy of Gray's Anatomy.) Is that a standard and reputable work in the science of anatomy?

A. Yes, sir. I do not think there is a complete skull in this book.

Q. Look on page 661?

A. There is a brain here.

Q. Look on pages 672 and 682?

A. There is a brain here. Here is a partial skull that will do as well; this is a very good representation of the brain.

Q. Explain to the jury the best you can the effect of a blow where it would strike the brain, and the various coatings inside the brain and out?

A. The brain, being very sensitive and tender in its organization, is enclosed in a cavity called a skull. This skull is covered with soft tissues. The skull is composed of two plates of bone, an outer and inner, separated by a soft tissue, so that an injury to the outside of the head breaks the force of the blow, and in such case it is pos-

sible to strike a blow that will fracture the internal frame of
144 the skull without fracturing the external part of the skull.
The internal part of the skull is lined by a membrane, and the brain itself, which is tolerably well represented here, is divided into parts, and each part is thrown into convolutions, especially the cerebrum in which are the special senses. Now this part of the brain is covered by another very delicate membrane. There is a membrane existing between the membrane covering the brain and that covering the skull proper. Now in this patient, the injury is about the middle or anterior part of the side of the larger portion of the brain. Now an injury at that point on the skull of this patient has, in my opinion, produced either a fracture of the internal table, or even if that did not occur it would produce more or less laceration or injury to the membrane I have described. If the membrane was lacerated it might be occasioned without breaking the skull. On the other hand the brain tissue might be injured itself by a bruise to the brain tissue, and inflammation supervene, with the formation of pus and an abscess. That is what I suspected at first, and one of these conditions I am satisfied existed locally.

Q. Explain to the jury what practical tests you have put him through to find his condition?

A. Many and various in detail, among which was, so far as the head proper is concerned, aside from what I could find, by tapping him on the head. There seems to be a little slight thickening of the external part, and you can feel a little thickened condition of the external cranium. When I jarred him by tapping him on the
head he complains of a certain pain that seems to radiate all
145 around in that part of the head towards the brain. So far as
the action of the muscles are concerned the tests are many; if he closes his eyes, I ask him to direct his finger to any point, and he makes an uncertain motion, showing a want of co-ordination of the muscles. Sometimes he can close his eyes better than at others. Sometimes he walked in a manner that we described as a want of co-ordination of the muscles, he lacks the power of directing them and connecting his mind with them. For these reasons I have thought, and still think, that from the condition of his nerves, the injury to the spinal cord must have been from some injury on the outside of the head or a blow on the head. There seems to be an injury to the posterior portion of the spinal cord. That is about all in detail that I discovered.

Q. How is his physical condition as compared to the time when you first examined him, as to weight and size of his muscles?

A. The muscular tissue seems to be in a soft flabby condition, more than when I first saw him. He has apparently diminished considerably in weight and decidedly so in strength, so far as I could ascertain from experiments with him as to his hands and feet. He has also changed much in color, and at times gets flushed, and at times he is very white, showing an impoverished condition of the secretions, especially of the red co-puscles of the blood.

Q. Have you made these tests frequently as to his temperature?

A. Many times.

Q. How does it generally run?

146 A. Not quite so high now, but always over and above the normal temperature.

Q. Did you take his temperature yesterday?

A. Yes, sir, day before yesterday it was 101½ and yesterday it was 100½, and today some gentleman took it, and they told me it was 100½.

Q. I will ask you to state your opinion as to how he compares in his present condition with his condition in perfect health to do manual labor?

A. I consider that he is physically incapacitated, both mentally and physically for anything requiring physical work.

Q. Tell the jury his condition of mind also.

A. When I first saw him he was suffering from the acute condition as to the result of the alleged blow, and although he was suffering pain his ideas were stronger and more common sense than they are now. He seems to have been in a slow manner losing the power of attention and confining his mind to any one point.

Q. I will ask you to state your opinion, from your observation and examination and experience with this patient, as such as you discern from the study of the science, what is the condition as to the future course of this patient as to his mind and body, as to the permanency of this injury, and the course it will probably pursue—will it get better or worse?

A. I think there is no doubt about it whatever that if he continues on and lives, he will certainly get worse. If an operation is performed on his skull now it is possible that it might relieve that

147 part so far as the brain is concerned, but I believe the spinal cord is injured to such an extent that an operation on the brain will not relieve the brain. I think the man is disabled mentally and physically.

Q. Have you given him medicinal remedies?

A. I have, many.

Q. State what the effect has been.

A. My treatment has been to relieve temporary conditions and trouble, and in addition to that if he became constipated I gave him something to relieve his bowels, and I gave him an anodyne to induce sleep, and I have tried to treat him too by dieting and sleep to increase his strength. He would come and tell me that what I gave him relieved him, and in the next week or two I would see him again and he would be in the same general condition. My constitutional treatment has been of no general utility, and he has gotten worse.

Q. Is it not a fact that these symptoms, and the natural consequence of a blow at this place, affects the nerves?

A. Yes, the brain is the head of the nervous system.

Court adjourned until 9.30 o'clock a. m.

FRIDAY, *September* 22, 1893.

Court convened at 9.30 o'clock a. m.

By consent of all parties to this action in open court, John L. Brown, one of the jurors sworn to try this case, was excused by the

court from further service on the jury, and the case proceeded on trial to be heard and decided by the remaining eleven jurors.

148 Dr. R. S. HARVEY on the stand.

Direct examination by Mr. HYDE continued:

Q. I have found the cuts that I desired you to show to the jury, if you can make these layers and situation of the brain more clear by these cuts, I would like to have you do so?

A. I will state this, as I attempted to describe to you yesterday in the absence of the skull. On this part of the skull, this covering of the brain proper, and the lining of the skull, the delicate membrane, are in position. The idea I tried to explain to you is that an internal injury of this bone, transmitted with force through this membrane, which is very delicate, would produce congestion and a sore condition in many forms. (Shows book to the jury.)

Q. I will ask you to state to the jury what is the sympathetic nervous system and its relation to the brain, spine, and general system.

A. The sympathetic nervous system is a nervous system in addition to the brain and spinal cord. The brain and spinal cord are called the cerebro-spinal center. In addition to that on the inside of the body and outside of the spinal column, we have what is called the sympathetic nervous system. It gets a great deal of the nervous supply from the spinal cord. There is a circulation between the spinal system and this sympathetic system and if by any impoverished condition of the cerebro-spinal system the circulation is lessened or becomes impaired, it weakens and affects the sympathetic system, so if that is impoverished we have a general impoverished abnormal condition of the human body.

149 Q. I will ask you to explain more fully to the jury what is indicated by this unnatural or high temperature that you testified you found in this patient so much of the time; explain something about the temperature of the body and illustrate it?

A. It is this, that the animal or human bodily temperature is 98¼ or ½; that is the temperature of the healthy animal body. Any departure from that, either above or below, indicates an unnatural condition or diseased condition from some positive actual cause. In a healthy condition the temperature is invariable, except from some external causes, and no matter what interferes with it it causes an acceleration or diminution of the temperature, and shows an abnormal and unnatural cause or condition.

Q. Explain to the jury the difference between increased respiration and circulation; for example, is it a fact that if a man runs or exercises to the highest limit, while it will increase his respiration and circulation, the temperature will remain the same?

A. Such is the fact; one can be excited or by exertion accelerate the pulse and also the respiration, which do not affect the temperature. The deviation indicates an abnormal condition.

Q. What has been the average deviation in this case?

A. At first, in the more acute condition of the case, the tempera-

ture ran up to 103. and subsequently the last few months that I have been trying it it has always been above normal, and two or three times quiet or below normal, but for the last two or three months during which time I have taken it many times it has been
150 about 100½ and 102 occasionally, and generally between 100 and 101.

Q. Is a degree or two or three regarded as a departure from natural?

A. It is an absolute departure.

Q. What does this higher temperature indicate?

A. It indicates an abnormal condition, and some physical defect or disease, or something to produce the acceleration of the temperature.

Q. Is it possible for a man to be in a healthy condition and have the temperature that this patient exhibits a great deal of the time?

A. It is a physical impossibility.

Cross-examination by Judge McBride:

Q. If I understand, you saw this man within one or two days after his injury?

A. Yes sir.

Q. And you treated him for a short time, and recommended him to go to the hospital, and did not see him again until his return?

A. That is true.

Q. How long was it after he went to the hospital before you saw him again?

A. I think about 4 or 5 or 6 weeks, it was a few weeks?

Q. Did you then examine him?

A. I did.

Q. What difference did you discover between the condition when you first saw him and when you saw him the second time after he returned from the hospital?

151 A. The condition in many respects was similar. There was a diminution of all those active symptons he had when I first saw him, but he still had the pain; the external swelling had almost entirely, if not entirely, subsided, but he complained of headache and a nervous condition, and sleeplessness, some in an increased condition, and others diminished. The acute class were diminished, but others were increased.

Q. Did he exhibit any inflammatory condition at that time?

A. Not of an acute nature.

Q. How did you detect that?

A. By his physical condition and the pain in his head.

Q. Was there any difference in the temperature then?

A. It was some less.

Q. So that those symptoms had subsided in degree?

A. Yes, the acute symptoms.

Q. How long did you treat him then?

A. Up to the present time, regularly and irregularly.

Q. He went to the hospital for a time?

A. Yes, he went there quite a time.
Q. Under your charge?
A. Yes, sir.
Q. And after coming out what was his condition when he quit the hospital here the second time?
A. It was about the same general condition of things.
Q. Was he discharged at your suggestion?
A. No, sir.
Q. Was there any change in his condition during the time that he was there?
152 A. The only change I noted, as I stated before, some improvement in some special details, but in the general signs there seemed to be a gradual general growing decrease of physical strength, power, and general condition.
Q. Then the change that you noticed, during the time of this treatment, up to the time he left the hospital, was a diminution of strength?
A. General strength, yes.
Q. How was it as to his flesh?
A. There seemed to be a general gradual emaciation.
Q. Has that continued from that time since?
A. Yes, gradually wasting.
Q. During that time has he followed any occupation?
A. Not to my knowledge.
Q. Did you suggest anything?
A. I suggested exercise, moving around in the fresh air.
Q. Do you know whether he took it?
A. I do not know, except he told me to the fullest extent in his power.
Q. Did you see him regularly?
A. Quite regularly.
Q. Now you have described what his symptons were,—I will ask you to state your best judgment from having treated him at the beginning, and your treatment during all this time, what in your opinion is the occasion for the condition in which you find him now?
A. I think that the direct and positive cause of his present condition is the physical results and effect following the injury such as I found him suffering from at first.
Q. Your opinion is that the injury which he received was the origin and cause of his present condition?
153 A. Possibly all, certainly that was visible, but whether the condition of the spinal cord was caused directly by the injury to the brain or head, or whether there was an injury of the spine at the time of the injury, I could not say. It is barely possible that the spine may have been originally injured; it is also possible that the injury to the brain may have produced the special condition which I discovered since.
Q. You did not know this man before?
A. No, sir.

Q. So you do not know what condition he was in, except as he appeared when you first saw him?

A. No, sir.

Q. You know nothing about his history?

A. No, sir.

Q. Or of his system prior to that time.

A. Nothing at all.

Q. You have described the difference between the two classes or groups of the nervous system or organization,—which of these two systems was injured at the time?

A. Of which two?

Q. The sympathetic or cerebro-spinal.

A. The cerebro-spinal I think beyond any question, but there may have been an injury to the sympathetic system.

Q. What are his symptoms now with reference to injuries to the sympathetic system?

A. I think his condition now would indicate some impairment of the sympathetic system, directly or indirectly.

Q. Doesn't it very largely indicate that?

A. Very largely.

154 Q. How would that be produced by the treatment that you refer to?

A. The effect on the sympathetic system would come from a long disease or injury to the spinal cord, for the reason that the sympathetic condition is so connected by relation to the spinal cord that if the spinal cord is injured the whole effect will be exhibited on the sympathetic system, and through the sympathetic system to the absorbent and digestive systems of the body.

Q. Would not a blow upon the body be a blow to the sympathetic system, and not affect the brain at all,—is it not true that such an injury would affect the sympathetic system and not the spinal system?

A. Yes, it would be like touching the leaves of the tree to affect the body of the tree.

Q. How then do you account for his condition so far as the sympathetic system is involved now by the injury to the brain?

A. By impoverishing the sympathetic system, by reason of a diminution or cutting off of the support it would receive from the cerebro-spinal system.

Q. Then it would be incidental and not direct?

A. Not direct, as from the effect of the blow, it would be the grand result.

Q. Where is the nervous center that affects the motor muscles?

A. The nerves or roots of the nerves presiding over the muscles come from the spinal cord; the cord gives off two roots, the posterior root and the anterior root.

Q. Where are the nerve centers of the brain?

155 A. I believe the center is in the cerebellum, but I may be mistaken.

Q. The plaintiff in this case had an injury over the eye?

A. Yes.

Q. The injury suffused the eye?

A. Yes.

Q. What muscular portion of the body, if the brain were injured, would be affected by it,—turning to that cut, tell us where the injury would manifest itself?

A. There is one cut here where the lobes of the brain are divided into sections,—on the ascending frontal convolution, involving movements of the hand and forearm in which the biceps are particularly engaged.

Q. Would it not manifest itself in the way indicated there?

A. Not absolutely, because taking your proposition the first injury would be simply a local injury, and the effects would not be visited so positively as they would subsequently.

Q. And they would not appear at that time?

A. Not as prominently as subsequently.

Q. Would not it necessarily manifest itself some time if it affected the brain?

A. Yes. These nervous centers are largely theoretical, and it is hard to tell what part of the brain is injured.

Q. You do not undertake to say that this work is not authority? (Refers to Gray's Anatomy.)

A. It is far better authority than any opinion of mine.

156 Q. "The relation that these localities of definite function in the brain bear to the exterior of the skull itself is of the greatest importance, for if accurately ascertained we can by means of it determine from the outside just where the fissures, sulci, and convolutions lie, and therefore where the above areas for certain functions are situated,"—is not that correct?

A. Yes sir.

Q. If that be true and the brain injured at such point, would not it some time manifest itself in the way I have indicated?

A. Yes, there is no question of that.

Q. What indication did you find in your examination of this plaintiff which satisfied you that it could be traced to that injury?

A. When I first saw him the effect was more general.

Q. What effect did you find which enabled you to trace it to that injury,—the use of the arm for instance?

A. I don't catch your point.

Q. What effect did you find in his action, or what muscle was affected by this particular injury here at any time, either then or afterwards?

A. At first I made no such investigation at all; I was simply treating and looking at the local condition. Subsequently the general symptoms came on.

Q. If the injury was located at this point, would not its effect necessarily have been to affect the motor muscles connected with that point?

A. Undoubtedly if the region of these muscles are at that immediate point.

157 Q. Were there any such manifestations in that man's actions?

A. I did not notice any at the time, except in a general sense.

Q. Were there afterwards any?

A. Yes, in his arms, and all parts of his body.

Q. In both arms?

A. Yes, but more especially in one.

Q. The injury on one side would not affect the other?

A. Theoretically and according to the authorities an injury to one part of the brain on one side extends to the other side.

Q. Is it not true that the brain is divided into convolutions or departments?

A. Yes.

Q. And is it not a common thing that an injury to one member leaves the other member unaffected?

A. Yes,—but if one nerve region is injured on one side the parts supplied by that nerve will be felt on the opposite side.

Q. Is there any proof at all that it had any special effect upon any portion of his body?

A. At that time the effect was more general, and the local condition was such that I did not pay special attention to its special effect. Now there appears to be a condition not so greatly marked. He claims to have less strength on the left side than on the right. I have measured both sides and the left side is a quarter to a half an inch less than in a normal condition.

Q. That is not uncommon in healthy persons?

A. No, sir, that is not a positive indication.

158 Q. Is there any difference in his gait?

A. Yes, there seems to be a more tremulous condition and less control of the left limbs than the right in walking.

Q. Is there any difference in his strength between one side and the other?

A. He says he has less strength in the left arm than in the right; that is a subjective condition that I cannot tell myself without an instrument.

Q. If you did not know of this injury having been received at all, would you be able by anything that you have observed or any effects observed outside of that, to locate the original injury?

A. Not certainly,—my suspicion would be excited so strongly that I would make an examination. It indicates an abnormal condition of the brain and spine, either traumatic or diseased.

Q. This man was in a very nervous and excited condition?

A. Yes, at times.

Q. Do you take that to be the result of his temperature or is it the result of some injury?

A. I did not know him in healthy condition, and I could not draw the comparison.

Q. Have you seen persons who have not received any injury in the same condition that he is now?

A. Yes, in a similar condition.

Q. Are there not other things and diseases that would produce the same condition?

A. Decidedly, so far as the effect of the disease is concerned, it

does not make much difference whether the original cause was accident or disease.

159 Q. Is there any difference in the temperament about the effect of an injury or disease upon the person?

A. Yes, I think there would be possibly more irritability from a traumatic cause.

Q. Would not persons become unsettled from anxiety?

A. That is true.

Q. Would not disease of the kidneys produce nearly the same symptoms as you have indicated in this man?

A. The general symptoms would be similar—any wasting disease—in some respects, and in others it would not.

Q. Then if I understand you correctly this condition has been produced by this blow—it has been through the communication that exists between the cerebro-spinal nervous system and the sympathetic nervous system by its being transmitted from one to the other?

A. I think so.

Q. There has been no direct injury to the cerebro-spinal system?

A. It seems to me there has been a direct injury to the cerebro-spinal.

Q. How?

A. By the original injury to the head and by the condition that I find the spine in and the effects that have been produced by that condition.

Q. There was no fracture of the skull?

A. Not that I could discover, not in the external table; there may have been a fracture of the internal table.

Q. This was a blow on the outside?

A. I so understand it.

160 Q. If there had been any fracture would it not have manifested itself on the outside?

A. No—it is true a blow on the outside of the skull may fracture the external and internal tables, but a blow may be received on the outside of the head and no fracture of the external table and yet a fracture of the internal table.

Q. Is it not generally just the other way?

A. I do not know what the statistics are, but I think the internal table may be fractured and the external table not, and the outside may be fractured, and frequently is, without injury to the internal plate, but frequently both are broken at the same time. The little membrane between the two plates of bone acts as a cushion and frequently prevents a fracture by a blow on the exterior.

Q. Is not that the purpose of the two plates?

A. Not the only purpose.

Q. How did you account for the inner plate being fractured and the outside not?

A. It is the rebound. When the blow is given an impulse is carried through, and the impulse breaks the inner plate and not the outer.

Q. You mean the reflex?

A. Not the reflex exactly, but the wave-like force.

Q. What is this man's condition at this time—what sort of a patient would you describe him to be?

A. I describe him as a man who is in an extremely abnormal mental and physical condition, particularly described as one knocked out. He is suffering from nervous prostration, mentally and physically; his secretions are not normal.

161 Q. What is his temperament?

A. His complexion would indicate a phlegmatic temperament, yet his mind would not indicate it but indicates a nervous temperament. He is in a nervous condition now but what his normal condition was I know nothing about at all.

Q. Is there anything in his appearance, taking his eye, his complexion, that indicates that he is disorganized?

A. Yes, he would impress me as a stranger that he was in a nervous, unnatural, abnormal and impoverished condition; in a nervous sense as well as a physical sense.

Q. His condition may be induced by a good many things?

A. Such an apparent condition may be induced by a good many things.

Q. Could it not be induced by medicines?

A. Yes, the physiological functions could be so affected by medicines as to make a man a physical wreck, and in the condition indicated by his nervous condition as well as his appearance.

Q. He told you where he was hurt and when, at the time he was injured?

A. Yes, I inquired into the cause, but it goes into one ear and out at the other.

Q. Did he say anything about a suit for the injuries?

A. Nothing at all, not at that time, but of late it was talked of.

Q. Did you know when the suit was brought?

A. No, sir, I think the first information I had was when the attorneys discussed it with me.

162 Q. At the time that you examined him when he came back from Missoula, did you tell him the extent of his injuries?

A. He was a man that I could not argue to and explain in detail, and I told him in substance that the condition that I first saw had not formed yet, and that I wanted to keep him under care and I might yet perform an operation. I did not discuss the condition in detail with him.

Q. What is your opinion now as to the local injury upon his brain?

A. I believe that if a post-mortem or ante-mortem dissection was made that there would be found a chronic thickened inflamed condition of the soft parts under and adjacent to the skull; it may be confined to the membrane, and the brain may be implicated, but in my honest opinion there is a chronic inflamed thickened condition in and around the location.

Q. What would be the treatment for that?

A. It would be trephining.

Q. You have not found it necessary to do that?

A. I was waiting the time when pus would form; I believe that there would be a formation of pus, and then I intended to trepan the skull; it was only the first stage of the formation of pus that I saw. It never reached the stage of the formation and accumulation of pus.

Q. Would there be any lesions of the brain until that state occurred?

A. Yes, a lesion of the brain may have occurred at the time as the result of the accident.

Q. Explain what a lesion is.

163 A. It is any rent, tear, laceration or injury to the brain substance itself as the result of disease or accident.

Q. Is there any evidence of that at all?

A. It is very positive to my mind that there is a lesion of some character there.

Q. Whereabouts?

A. Originally at this spot. It may be the internal pressure of the internal blood on the brain.

Q. What evidence is there now of its existence?

A. His mental and physical condition.

Q. Is there locally any evidence at all of its existence externally, by anything that you can see?

A. Yes, by a careful examination you are able to detect an abnormal condition about the seat of the injury, but that indicates nothing at all except that an injury has been there. What the internal condition is I do not know positively, but I reason by observation and professional knowledge of the case that there is a decidedly abnormal condition in his cranium.

Q. The normal temperature of the human body is 98½?

A. Yes, or 98¼.

Q. Is it at all unusual to find it varying from that?

A. In a healthy normal condition it is unusual to have it vary from that.

Q. Does not the temperature vary?

A. No sir, not without cause.

Q. In different persons and different climates is there not a difference of temperature?

A. I think not. It is set down as a positive fact that the temperature of the animal body is as I say.

164 Q. Are there not variations in healthy persons of from two or three degrees?

A. No sir, in a healthy or normal body such is not the case. A positively healthy person in a normal condition will not admit of a variation of two or three degrees of temperature.

Q. I am not speaking of one person but as between persons.

A. No, the temperature is supposed to be alike as to all normally healthy persons; there may be a variation in the instrument of a fractional part of a degree, but that would not be a diseased condition, but with a well-tested thermometer there should be no variation between you and me if we are in the same normal condition.

Q. Is it not the matter of diet and the way the person lives that affects it?

A. Not directly, only indirectly.

Q. Suppose a man lives upon meat and eats a great deal of grease?

A. It affects the blood and general condition, but should not affect the temperature. If a man lives on meat all the time or strong meat diet he certainly would not be in a normal animal physical condition.

Q. Take a man like an Eskimo, who lives largely on oil, what would be the temperature of such a person?

A. Fats and oils produce physical heat, and if an Eskimo is made like the rest of us,—I do not know anything about the physical make-up of an Eskimo.

Q. Then the doctrine of heat and diet is not true?

A. Yes, absolutely true; it affects the bodily heat, but not the temperature as indicated by a thermometer. It produces
165 heat, but in a cold climate the object is to keep up the normal temperature. The outside cold is so severe that I think the diet of the Eskimo is to keep up the natural condition, and I think you will find the temperature of the Eskimo the same as in an American.

Q. I understand you to say that any injury to the brain or spinal cord would affect the sympathetic nervous system?

A. No sir, you misunderstood me.

Q. Is it not correct?

A. The injury may be so light as not to be appreciable; it may have a very delicate effect that one could not appreciate at all. The sympathetic system, while connected intimately with the cerebro-spinal, is not a part of the cerebro-spinal. The relation is very intimate indeed; they are bound together by ties of affection and physical ties, but it is not a part of the cerebro-spinal.

Q. Was this injury to the cerebro-spinal or to the sympathetic system?

A. Cerebro-spinal.

Q. Would not that necessarily affect the sympathetic system?

A. It certainly would ultimately affect the sympathetic system.

Q. If that were true, the sympathetic system being distributed over the entire brain, would it not affect the entire system?

A. Yes, in this condition it would affect the entire sympathetic system.

Q. How do you account for these nervous manifestations of this man,—from the injury to the cerebro-spinal system?

166 A. For the reason that the nervous system has been injured and so much reduced that it is the result of the injury and the abnormal condition.

Q. Did you find any indication of any injury to the spinal cord?

A. I found a sensitive tender condition in certain parts of the spinal cord which indicates an irritation or abnormal condition. The two sensitive spots are one on the dorsal and one on the lumbar.

Q. Does anything in the locality indicate the origin of the difficulty?

A. No, sir, because I do not know whether indirect, or the spine may have been injured directly at the time. Such an injury can be produced by an injury to the spine and without an injury to the brain.

Q. Whereabouts is the tender spot in the dorsal?

A. The tender spot is about between the third and fifth dorsal.

Q. Where is the responsive center from that point?

A. I cannot locate that without looking for it.

Q. Is it in the region of this injury at all?

A. I think it is according to the table you showed me here.

Q. Is it anywhere within that convolution?

A. I think it is.

Q. Is it in that convolution of the brain or that department?

A. Yes it is somewhere in the cerebrum; in that neighborhood.

Q. Did this man manifest any special nervous weakness,—did he bear excitement or anything of that kind?

167 A. He manifested a decided impression from excitement, either mental or physical.

Q. What is his capacity for feeling?

A. It is abnormal, decidedly; in an intelligent sense it is defective.

Q. Are his senses acute?

A. Yes, I could find very little abnormal condition of that character, but the sense of touch so far as the fingers are concerned is abnormal; he cannot recognize the difference in touch, like pieces of money.

Q. If these motor nerves were absolutely injured what would be the effect?

A. If the motor nerves were injured, it would be followed by symptoms and conditions of paralysis.

Q. Any destruction of the sense of feeling?

A. Not necessarily, it would be lessened possibly, but not to any appreciable extent.

Q. You do not find any symptoms of that sort in this man?

A. No, sir.

Q. He is sensitive to the touch?

A. Frequently he would say he would not feel the point of a needle, and other times he would feel it immediately. I have touched him with a needle, and asked him if he felt it, and he would say no, and again now I feel it; and again possibly he would feel it at once.

Q. He is abnormally sensitive at times?

A. No, I do not think he is abnormally sensitive.

Q. That would not be the case if there was any paralysis of the nervous system?

A. If there was paralysis, it would not be the case, of course; there would be a lessening of it.

168 Q. I mean a deterioration of his strength?

A. No, not necessarily.

Q. He is easily excited?

A. Very much so.

Q. What does this indicate,—an acute condition of the nervous system?

A. No, it would indicate the opposite, an abnormal weakened condition.

Q. What is the difference in his manifestations between such as you have witnessed with him and ordinary hysteria?

A. I think the difference is this that he presents decidedly hysterical symptoms, but at the same time what might be called his hysterical condition is a true diseased condition producing it, while another person might be hysterical and not have any organized disease. Hysteria is a pure *bona fide* positive disease.

Q. It may exist where there is no disease of the functional parts of the body?

A. Decidedly.

Q. Might it not be so with him?

A. I think his organic parts are in an abnormal condition. I think the spinal cord is also implicated.

Q. Do you attribute the condition of the spinal cord now to the result of this injury?

A. I don't know whether it is the result of the injury to the head or an original injury to the spine itself but the condition exists none the less.

Q. How do you ascertain the condition of the spinal cord as to whether it is diseased or in a normal condition?

169 A. By physical examination; by sense of touch; by a careful examination of the parts supplied by the nerves that come from the spine and by a sense of soreness of the cord itself, or by any part of the vertebra being fractured.

Q. Have you applied these tests to this party?

A. I have frequently.

Q. Have you located where this disease is in the spinal cord?

A. Yes, in a satisfactory manner I can locate it; irregularly along the spine, but particularly at the two spots I indicated a few minutes ago.

Q. You say you have examined the spinal column carefully; is there anything on the exterior to indicate a diseased condition of the column itself?

A. No, sir; I recognized nothing of the kind. There might be a fracture of the spine and I would be unable to find the fracture, but in his case there is nothing abnormal so far as I discovered in the bony portion of the spine.

Q. Did he make any complaint to you of any injury to the spine when he first came?

A. When he first came the injury to his head in his opinion and as the result of my observation seemed to be all the injury that he complained of. After I got through with the examination of the head, I asked him if he was hurt elsewhere, and he said no, except his legs hurt him and his back hurt him. I made no examination of the spine then, but I only made the examination of the spine when these later phenomena came on.

Redirect examination by Mr. HYDE:

170 Q. Take this book as I want to make more clear what was touched upon in the cross-examination; what do you call this part of the brain?

A. This is a portion of the cerebrum. The brain is divided into sections, the cerebrum and the cerebellum; it lies in the interior, filling the whole interior part of the skull and is indicated by my pencil here. (Indicating on cut in book.)

Q. Show where this blow was and the injury that you found when you first examined the patient?

A. As near as I can locate it, it was about where I hold my pencil. (Indicating.)

Q. Now on page 54 of this book; you were asked some questions with reference to blows upon the head and the effect of injuries to the head and brain upon the locomotion of the legs and arms; is it not a fact that blows or injuries to the skull in which the result is manifested by want of power of locomotion—that they are all back of this frontal portion?

A. According to the diagram the nervous center or original seat of the nerves seems to arise in this point and this injury was about this point (indicating). Now speech has its organ here (indicating) and the arms, hands, trunk and legs here (indicating); these are all posterior to and above the point of injury in this case under consideration.

Q. Now, on page 14, is it not true that this is what is called an unexplored or more unknown portion of the brain than any other?

A. Such is absolutely true.

Q. Then the particular manifestations of a blow as manifested in the particular muscles of the body are all back of the place where this injury took effect?

171 A. Yes, above and back of it.

Q. And this injury was at a point where the effect would be more general to the whole system?

A. I do not know that it is any more.

Q. Would it not kill a man quickly?

A. No sir, that part of the brain can be extracted and the animal live.

A. Now, I will ask you another question about the thickness of the skull; how is the skull at the place where this injury was on the left side as to being thick or thin?

A. The temple region is supposed to be the thinnest part of the skull, and this blow is just on the anterior part of that. There is a compact tissue which is very firm and this temple bone has more of the compact tissue than the thicker bone, and while it is thinner and more easily cracked, yet it is as strong as any other part of the brain.

Q. What is the effect of the removal of this part of the brain from a patient?

A. He is without mind. I have seen them stagger around like a piece of machinery.

Q. Would a blow upon one part of the brain produce some effect or concussion upon all parts of the brain?

A. It might or it might not. If the blow was sufficiently great to produce a concussion of the brain tissue, you cannot tell where it will extend; if the blow was sufficiently strong to and did produce a concussion, either temporarily or positively the concussion may have gone every and anywhere—not everywhere but almost anywhere.

172 Q. Now as to the effects of brain concussion; what is the general course as to their being permanent?

A. That depends upon the extent and locality of it. When the head is struck it is the rebound both the going and coming back of the force which is broken up in an undescribable and irregular way. It may rent and tear the tissues and it may not tear them, or it may produce an injury to certain blood-vessels and the result is that there is a general jarred condition of the brain, and the result is inflammation and the formation of pus anywhere where the concussion may have had its effect.

Q. What is the disease called pachy-meningitis; is it the condition produced in this patient?

A. That is a good term; meningitis means inflam-ation of these membranes. The word pachy means thick; pachy-meningitis would mean a thickened, roughened condition.

Q. What is the course of that disease as manifested by the symptons found in this patient?

A. Pachy-meningitis means a thickened, chronic, inflamed condition, depending upon its location, place and extent; it would mean more or less as the place might indicate.

Q. The nervous system that you were cross-examined about, and the sympathetic system, and the deranged condition of that system, is that what you call neuresthenea?

A. Not necessarily; that is a disease, or more generally a condition; that is more generally nervous prostration—that is the
173 plain English of it. The condition might be easily suggested from poison or any other diseased condition.

Q. What is the condition of this patient in that respect?

A. He has decidedly neuresthenea; I think there is no question about that.

Recross-examination by Judge McBride:

Q. I understand you this name pachy-meningitis you think applicable to this particular case?

A. Yes, it could be called that condition. It is a name, if I am right, that would be a very good name to use.

Q. You say there is between the two plates that constitute the skull a kind of cushion or membrane underneath, and next to the inner plate is also a membrane, and the brain itself is held within a separate membrane?

A. Yes.

Q. What is it that is thickened in this particular case?

A. The skull is lined by one membrane and the brain is covered by another, and between these two is a very delicate membrane; and my idea of his condition is that admitting that the inner skull is not fractured, there had been inflammation and is now a chronically thickened condition of the membrane covering the brain and the membrane lining the skull, and the membrane between the two membranes.

Q. What evidence is there of that fact?

A. Externally and locally there is none.

Q. What evidence have you except the subsequent symptoms which you discovered in his conduct?

174 A. The one positive evidence I have is that when I tapped on or around the seat of injury, there was unmistakable pain; and he describes that pain as emanating always around this spot. The pain radiates up and around, extending internally and upward in the brain showing the membranes are inflamed.

Q. That is the evidence by which you localize it?

A. Yes, sir.

(By Mr. HYDE:)

Q. I want to ask you with reference to an injury to the spine; is it not a fact that what at first appears to be a slight injury to the spine, may develop and grow to be a serious injury?

A. That is certainly the case.

Q. It is also true with blows upon the head that they sometimes increase in their effects and the disease developes later?

A. That is true.

(By Judge MCBRIDE:)

Q. Is it not also frequently traceable to some intervening cause—the development?

A. If it can be traced to any intervening cause——

Q. It may be the result of sickness?

A. The idea is this, admitting that an injury occurred that was not visible to the eye or examination and that might subsequently terminate in a serious condition, and I say yes. There might a condition subsequently supervene that would only assist in precipitating the end and develop it.

Dr. C. W. POWERS, a witness called and sworn on behalf of the plaintiff, testifies as follows:

Direct examination by Mr. HYDE:

Q. State your name, age and place of residence.

175 A. C. W. Powers, 34 years of age; Spokane, Washington.

Q. How long have you resided in Spokane?

A. Four years.

Q. What is your occupation?

A. I am a physician and surgeon.

Q. Where did you study medicine and surgery?

A. I graduated at Cleveland, Ohio.

Q. Did you study at any other place?
A. No sir; no other college.
Q. How long have you been in practice?
A. About eight years.
Q. Where did you practice?
A. I have practiced in China, Japan, Corea and in the United States.
Q. What experience have you had as a surgeon in any of these places and what opportunities have you had to have experience and observation of brain diseases.
A. I have had charge of the government hospital two and one-half years in under the Corea government.
Q. What were your opportunities there for practice and observing diseases?
A. I was practically engaged in the following of my profession.
Q. Surgery principally?
A. Yes sir.
Q. Four years you have practiced in Spokane?
A. Yes sir.
Q. Do you know the plaintiff in this action?
A. I met him recently.
Q. When was you attention first called to him?.
A. I think about a week ago?
176 Q. Were you requested to make an examination of him?
A. I was requested by his attorney to do so.
Q. Did you make an examination?
A. I did.
Q. Tell the jury in what condition you found him.
A. In a very serious condition, damaged physically; in a very weakened condition.
Q. Go on and tell the jury something about what physical manifestations and conditions you found, especially with reference to the head and muscles?
A. I asked him for a history of the case and how he was suffering. Upon my first introduction to the man, I spoke to him and he seemed to be in a tremble and very nervous. I asked if he had been injured and he said he had, and I asked him where, and he said on the skull. I felt with my finger for external signs of the injury, and I thought I felt a thickening of the temple bone in that vicinity, and afterwards I examined his spine and found a tenderness along the spine, and I took his temperature and found a rise in the temperature that was abnormal. I think his temperature was 102. I looked at his eyes but did not see much at that time to indicate any trouble, but in tapping his skull he complained of a shooting pain up into the top part of his head. I tried the reflex by striking him on the knees and found him sensitive. I told him to close his eyes and walk around, and he seemed to stagger, and I tried other nervous tests and found them all satisfactory to carry out the theory that he had been injured in the brain.
Q. You have examined him several times?
177 A. Yes, sir.

Q. How did you find his mental condition as to strength and health of mind?

A. It is my opinion that the man is weak—his memory is short. During the week's aquaintance I have not had much chance to find that out.

Q. Do you regard him as an able-bodied man or not?

A. I do not.

Q. Give the jury your opinion as to what the condition of the skull is, what symptoms you found and what injury has been produced to the skull?

A. It is my impression that there is a thickening of the membrane immediately under or behind where he was struck and perhaps of the cerebrum and the brain tissue itself, and it is my impression that from the start there may have been a clot of blood or several of them in that immediate vicinity which has hardened or solidified and left there hard enough and large enough to produce pressure upon the brain.

Q. Are these manifestations such as would follow from a condition and injury of that kind?

A. Yes, sir.

Q. State your opinion as to the probable future of this patient from the effects of this condition and its duration and course in the future?

Question objected to by defendants' counsel. Objection overruled; to which ruling defendants excepted.

A. I think that from a continuation of this sub-acute or chronic inflammation that softening of the brain will ultimately result. That is one thing—perhaps paralysis might be another that would result.

178 Q. What is the probable future course of this affection as to its effect upon his being able to perform manual labor?

A. If this inflammatory condition continues, his chances would be gradually and constantly lessened.

Q. His ability to perform work?

A. Yes, sir.

Cross-examination by Judge McBRIDE:

Q. You say you examined this man with reference to this injury and his present condition within a week?

A. Yes, sir.

Q. What in your opinion from the examination you gave is the occasion or reason for his present condition?

A. I believe it is a pressure upon the brain caused by an injury—a traumatic occurrence.

Q. Have you seen persons in like condition, emaciated, nerveless, weak and all that, who had been suffering from any such injury?

A. Not exactly his condition. I have seen a great many conditions that resemble each other, but this seemed to be a very marked case of injury.

Q. In what particular does it differ from many other cases, for instance, of common hysteria?

A. In common hysteria you would not find the thickening of the bone. You perhaps would not find the contraction and dilation of the pupil of the eye which he has, and in chronic hysteria if he was affected in that portion there would not be a shooting of the pains to the upper part of the skull. These are three things that would differ from common hysteria.

179 Q. Have you seen persons afflicted with kidney disease—afflicted with all the symptoms that he has of emaciated weakness, movements and tenderness?

A. I have seen a great many of these symptoms accompany kidney troubles.

Q. Have you seen people just worry themselves into the condition he is in?

A. They have some of the same symptoms but not so marked.

Q. If you had not been informed at all of any injury to this man, and had examined him simply as you would examine a man without any history at all, would you have reached this conclusion from what you saw?

A. Yes, I would.

Q. You have seen a great many cases where there was a thickening of the skull where there was no injury at all to the brain?

A. Very few. I have seen them.

Q. That of itself would not be any indication to you?

A. Not a mere thickening of the skull without the following up of these symptoms.

Q. I asked you if you were not somewhat indebted for it to the history of the case?

A. Yes; that is somewhat true.

Q. Then the manifestations are not reliable or conclusive?

A. Sometimes they are.

Q. If they are sufficiently clear?

A. Yes, sir.

Q. You regard them as sufficiently clear in this case without any history of the case?

180 A. Without making the examination of this patient, without any previous knowledge of him at all, I think the first question I would ask him would be had he met with an injury. I think it would lead me to do so.

Q. How long have you been here?

A. Four years.

LEE BATES, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination by Mr. HYDE:

Q. Where do you reside?

A. Spokane.

Q. How long have you lived here?

A. Four years pretty near.

Q. What business do you follow?
A. Railroading.
Q. What capacity?
A. I have been conductor for about two years.
Q. On what road?
A. Northern Pacific.
Q. How long have you known this man, the plaintiff?
A. He made one trip for me. That was all the time I knew him.
Q. When was that?
A. About a year ago.
Q. Before the injury?
A. Yes, sir.
Q. What were you doing then, running as conductor?
A. Yes, sir, I was.
Q. And he ran one trip with you as brakeman?
A. Yes, sir.
181 Q. On what road?
A. On the Spokane & Palouse branch.
Q. Try and designate the time as near as you can?
A. It was about a week before the accident happened, or two weeks.
Q. You are sure it was before this collision?
A. Yes, sir.
Q. You knew of the collision at the time?
A. I heard of it.
Q. Tell the jury what was his physical condition then as to being strong and healthy.
A. He was a good healthy man. I considered him a man that understood his business as a brakeman and attended to it.
Q. He performed it well?
A. Yes, sir, he did.
Q. Have you had opportunity to observe the plaintiff frequently during the past year?
A. I have never seen him since the accident happened until I met him here.
Q. At the time of this trial?
A. Yes, sir.
Q. What was his physical condition now compared to his health and strength at the time you were acquainted with him before the accident?

Question objected to by defendant on the ground that witness is not a physician or surgeon.
Objection overruled, to which ruling defendant excepted.

A. I judge he was 20 or 25 pounds heavier at the time he worked for me than he is at present.
182 Q. How does he appear to be mentally now compared to the way he appeared at that time?
A. He does not look to be as good a man.
Q. His mental condition then has changed—state what the fact is whether it has changed.

A. Yes, as I say, I do not know how bad the man is but I should judge that he is not as good a man as he was at that time.

Q. What do you know about his condition now, his physical condition as to being capable and able and strong enough to perform the duties of a brakeman, if you know?

A. I do not know anything about what his condition is at present.

Q. A brakeman requires a man that is agile and strong and sure and muscular?

A. Yes, especially on that run.

Q. That is a run that requires a good man?

A. Yes.

Q. On the mountain grades?

A. Yes, a mountain grade of about 14 miles.

Q. Have you seen or observed enough of him recently to judge whether he would be able to do that work?

A. I do not think he would be at present the way he appears.

No cross-examination.

M. H. LAWSON, a witness called and sworn on behalf of plaintiff, testified as follows:

183 Direct examination—question- by Mr. HYDE:

Q. Where do you reside?

A. Spokane.

Q. How long have you resided here?

A. Pretty near four years.

Q. What business do you follow?

A. Contractor and builder.

Q. Do you know the plaintiff here?

A. Yes, sir.

Q. How long have you known him?

A. About eight months.

Q. He has roomed at the same place you did?

A. Yes, sir.

Q. How much of the time?

A. Well, he has been with me a little over three months.

Q. Tell the jury what his state of health and strength has been during that time and what his symptoms have been during that time?

A. He looks to me very weak and nervous.

Q. What have you seen to show you that he is weak and nervous?

A. Well, by his action.

Q. Tell the jury what his actions were?

A. He has not done any work since he has been with me.

Q. What have you seen of him and how has he acted and appeared and what symptoms have you seen?

A. By his movements and actions around the house.

Q. How has his mind seemed to be from his talk?

184 A. Some time his mind was all right; some other times it was kind of off from the way he talked.

Q. Have you seen anything that he has done during his sleep at night?

A. Yes, sir.

Q. Tell the jury all about that.

A. Well he waked me up many times by jumping in bed and was nervous. Last night again.

Q. Did he say anything in the night?

A. He talked to himself but I could not understand what he was talking about.

Q. And he did that last night?

A. Yes, sir. We sleep in the same bed.

Q. Cannot you go on and tell the jury anything else that you have seen about his condition?

A. A very little thing like the fire department, when the fire-engine goes up the street he will tremble for two hours afterwards. It makes him nervous and he gets scared. When the fire department goes out he will tremble for two or three hours afterwards and every little thing that goes on.

Cross-examination by Mr. ALLEN:

Q. Where do you room?

A. On First street.

Q. What building?

A. It is only one room; it is a little house.

Q. Do yourself and this plaintiff room together and sleep together?

A. Yes, sir.

Q. The same bed?

A. Yes, sir.

185 Q. How long have you done so?

A. Over three months now.

Q. How did you come to room together?

A. We used to board in the same house together, and when he left there he came up with me to sleep with me.

Q. Where was it he boarded before that?

A. On First street, between Monroe and Lincoln, but they moved that house and I told him to come down and stay with me.

Q. He sometimes talks in his sleep?

A. Yes, sir.

Q. Have you not seen a great many people that talk in their sleep?

A. Yes sir.

Q. Have you never slept with men before that sometimes started and jumped in their sleep?

A. Not as much as that.

Q. Can you say that he was particularly restless last night?

A. Yes he waked me up last night by jumping on the bed.

Q. How did he jump?

A. Nervous.

Q. You have never known him to do any work?

A. He never done any work since I have known him.
Q. Where does he board?
A. At the hotel.
Q. He does not board at the same place you do?
A. No sir.
Q. Then you only see him occasionally nights?
186 A. He is around the house in the daytime part of the time.
Q. Are you taking any interest in this lawsuit in any way?
A. No sir.
Q. Have you aided him in any way in the expenses of the suit or in caring for himself while the litigation was pending?
A. No sir.
Q. You say he has never done any work since you have known him?
A. No sir.
Q. He had this lawsuit pending all the time since you have known him?
A. I do not know how long he has had the lawsuit pending.
Q. Did he talk with you about the suit?
A. He told me that he had a suit; that was all.

J. J. BALDWIN, being first called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. CROTTY:

Q. Do you know this plaintiff?
A. A little over two years.
Q. Did you know him before the accident?
A. Yes, sir.
Q. What business do you follow?
A. Contractor.
Q. Where do you reside?
A. Spokane.
Q. How long have you lived here?
187 A. Pretty nearly a year.
Q. You have known the plaintiff about two years?
A. A little over two years now.
Q. Where did you know him first?
A. Great Falls.
Q. Have you known him nearly all the time for the past two years?
A. Pretty nearly all the time.
Q. What was his condition as to being a strong, healthy man before this accident?
A. He was healthy and active, he was in good condition.
Q. You knew him when he was engaged in braking?
A. Yes, he was switching in the yards.
Q. Have you seen him frequently since the 7th of October last?
A. I have seen him three times since last October.

Q. The accident was on the 7th of last October, and you have seen him three times since that?

A. Yes, sir.

Q. When was the first time?

A. I saw him here in Spokane.

Q. What was his physical condition as to health and strength, when you saw him then, compared to what it was before the time of the accident?

A. It was a big difference, because I asked him if he had run through a machine, or what had happened to him. He didn't look to me to be the same person at all, or that he would be able to brake again.

Q. How did it show, and what seemed to be the difference?

188 A. When I saw him there in Great Falls and Kalispel he was a man that weighed about 150 pounds and now it seemed to me he didn't weigh over 120 pounds. I couldn't tell about his physical condition, but he didn't look to be a man as strong as he was before.

Q. Did you notice his condition mentally, and did you notice any change?

A. I noticed that he was a great deal poorer.

Q. I mean his mind.

A. His mind was not the same at all.

Q. How was it different?

A. Because he looked nervous to me when I met him here in Spokane. When I spoke to him he kind of trembled on his feet, and his hands were trembling, but when I saw him in Great Falls and Kalispel, he never trembled, and was not nervous at all, and his talk has weakened.

No cross-examination.

GRANT TINLING, being first called and sworn as a witness on behalf of the plaintiff, testified as follows:

Direct examination by Mr. HYDE:

Q. You are the man who first picked up the plaintiff, at the time of the alleged accident?

A. Yes, sir.

Q. Tell the jury how far it was from the place where he was supposed to be standing, to where you found him.

A. It was stony ground about thirty feet from the train.

189 Q. What kind of a place did he fall on; was there rocks there?

A. It was in a hole between the rocks.

Q. You are now in the employ of the Northern Pacific Railroad Company?

A. Yes, sir.

Q. And were then?

A. Yes, sir.

Cross-examination by Mr. ALLEN:

Q. At the time you found him after the accident, he was about thirty feet from the flat car?

A. From the train.

Q. Did you see him when he fell off of the train?

A. No, sir.

Q. Where were you?

A. I was ahead of the engine, or along the side of the train.

Q. How far from him?

A. About two cars.

Q. What were you doing at the time of the accident?

A. I started to open the switch to drop the flat cars in.

Q. You didn't see him fall?

A. No, sir.

Q. How did you come to find him?

A. I came back to see if anybody was hurt after the train struck. I found him there and saw his light was burning.

Q. Where was his lamp?

A. He had hold of it in his hand.

190 Q. Where was he the last time you saw him, previous to the accident?

A. I don't know. We were both out on top of the train and I left him and got over on the engine, and when we stopped, I started for the switch, and that is the last I saw of him till I found him.

Q. Was he lying down or standing up at the time you found him?

A. He was in a kind of sitting position and had his lantern in his hand.

Q. Had his lantern in his hand?

A. Yes, sir.

Q. How long was that after the accident?

A. I walked about three cars.

Q. Just long enough for you to walk three cars?

A. Yes, sir.

Q. What did you do immediately after you got to him?

A. I asked him if he was hurt. I couldn't get any answer out of him and I assisted him up on his feet and went to the engine, and he got up on the engine.

Q. Did you go anywhere else before you went to the engine?

A. No, sir.

Q. Was anybody else present at the time you assisted him up?

A. No one present but the engineer and fireman. They were standing in the cab watching me when I brought him up.

Q. No one was with you, except yourself and Mr. Poirier?

A. No, sir.

191 Q. Did you assist him on the engine, or did he get on the engine himself?

A. He got on the engine himself.

Q. Did you have any talk with him on the way to the engine?

A. No, sir. After I could not get a word out of him, I said nothing more.

Q. Did you have any talk with him later that evening?

Plaintiff's counsel objects to the question.

Objection overruled.

A. He slept in the same caboose with me that night

Q. Did you have any conversation with him that night?

Objected to.

Q. You say Poirier slept with you in the caboose that night?

A. Yes, sir.

Q. Is that the usual place for sleeping?

A. At that end of the road it is.

Q. That was at Kendrick?

A. Yes, sir.

Q. How soon did you go to bed after you got to Kendrick?

A. Not very long; inside of half an hour.

Q. Did he make any attempt to get a physician or anything to apply to his injuries?

A. No, sir.

Objected to as not proper cross-examination.

Objection sustained.

192 A. P. LAMEW, a witness called and sworn on behalf of plaintiff, testified as follows:

Direct examination by Mr. HYDE:

Q. Where do you live?

A. In Spokane at present. I have been living here a little more than a year.

Q. What is your occupation?

A. I am train conductor.

Q. Are you running now?

A. Yes, sir.

Q. On what road?

A. On the Great Northern.

Q. Are you running passenger trains?

A. Yes, sir.

Q. Do you know this plaintiff sitting here?

A. Yes, sir.

Q. How long have you known him?

A. I have known him for seven or eight years or more.

Q. Where have you known him?

A. I knew him first on the Canadian Pacific, and, second, I met him again at Great Falls, on the Great Northern, and then again here on the Great Northern and in Spokane.

Q. You knew very well about his health and physical condition before the 7th of last October?

A. Yes.

Q. What was his condition during this period of time that you knew him as to being a strong, healthy man?

A. First class.

193 Q. What was his condition mentally?

A. First rate.

Q. How much have you seen him since the 7th of last October?

A. I saw him a good many different times. He would come to my room.

Q. You have had opportunity to observe his physical condition and health and strength?

A. Yes, sir.

Q. What has it been since?

A. I don't know what you would call it but kind of absent-minded, and sometimes he would come along and walk with you and be talking all right, and all at once he would get off and get onto something else; or sometimes he would commence the first thing to talk and you would see right away that he was off, and some other times he would be afraid, he would be nervous. Yesterday I took him up to dinner with me at the Hotel Spokane, and he was afraid to go into the house, and many things like that, or to go on a freight car, he would be nervous and he was not sure of a thing.

Q. What is your opinion then of his mind as to being strong or weak?

A. His mind is awfully weak.

Q. How does it compare to what it was before?

A. It is not the same thing at all.

Q. It is much weaker?

A. Much weaker.

Q. How is his physical condition as to his muscles and weight, since and before?

A. It looked to me like a difference of more than thirty

194 pounds; there is not that much but it looks like more than that difference to me. He looked like a different man than what he was before.

Q. How long have you been railroading?

A. For about twelve years.

Q. You know what the duties and requirements of a brakeman are.

A. Yes.

Q. I will ask you if you think his physical condition is such that he could perform the duties of train-work on a railroad?

A. No, sir.

Cross-examination by Mr. ALLEN.

Q. How often have you seen him since October last?

A. I could not tell, but a good many different times.

Q. Did you see him any time before the middle of November?

A. If I remember right I think I saw him after he got back from Missoula but I could not tell you the time.

Q. You did not see him after the accident until after he came back from Missoula?

A. I don't think I did see him after the accident until after he returned from Missoula.

Q. How often have you seen him since that?

A. Nearly every week when I was in town. Of course, when I did not come into town I did not see him.

Q. Did he visit you at your room?

A. I went to visit him a good many times. I found him at the hotel and used to take him stuff.

Q. You are both of the same countrymen?

195 A. Yes, sir. I was off a while but when I was in town, if he did not come up or could not come up I used to go and see him.

Q. You have no means of knowledge as to what has brought about his present condition—of your own knowledge?

A. No; except what I understand of it, that is all.

Q. Nothing of your own knowledge?

A. No, sir.

Mr. Hyde offered in evidence the book of rules of the Northern Pacific Railroad Company in effect March 29, 1891, marked B.

Recess taken until 1.30 p. m.

Afternoon Session—1.30 *p. m.*

Mr. Hyde read in evidence on behalf of plaintiff from the book of rules of the Northern Pacific Railroad Company, heretofore offered in evidence, the following rules: Nos. 342, 343, 341, 158, 156, 164, 165, 134, 120, 122, 390, 228, 229, 346 and 133.

Mr. HYDE: With the exception of Carlisle tables which we have sent for and will hand up to your honor shortly, the plaintiff will now rest.

Mr. ALLEN: We ask the privilege this forenoon of recalling Mr. Allen for further cross-examination a moment and it was understood that he would be here at the close of plaintiff's case.

J. J. ALLEN recalled by defendants for further cross-examination.

196 Cross-examination by Mr. ALLEN continued:

Q. I believe you testified that you were the rear brakeman on this train No. 59 at the time of this accident?

A. I did.

Q. It was a part of your duty, was it not, to keep the lights and lamps on that caboose in order and in proper place?

A. Yes, sir.

Q. On that train?

A. Yes, sir.

Q. I will ask you whether or not the tail lamps, I believe that is

what they are called, at the end of the train, were in there place and lighted.

A. They were.

Q. What light did they display, what color?

A. They displayed a red light.

Q. That is the customary light while the train is on the main line?

A. That is the danger signal.

Q. And those lights were in their place?

A. Yes, sir.

Q. I will ask you whether those lamps have three colors in them.

A. They have.

Q. And it depends upon which one is turned to the rear as to which shows from the rear?

A. Yes, sir.

Q. One is red, and another green and the other is what?

A. White.

197 Q. The red is the danger signal?

A. It is.

Q. And that face of the lamp was towards the rear?

A. It was.

Q. One on each side of the hind end of the caboose?

A. Yes, sir.

Q. About how high up were they on the caboose?

A. I should judge a little more than two-third- up the caboose; up so they would not hit a man's head when he walks out.

Q. They were in a position where they could have been seen by the engineer of the extra which ran into the caboose?

A. Yes they were.

Q. Could the engineer of this extra have seen those lamps as soon or sooner than he could have seen the lanterns that you were swinging on the top of the car?

Mr. Hyde objected to the question on the ground that it calls for the opinion of the witness instead of a statement of the facts.

The court overruled the objection.

A. From the position we were in, and the track they were on, I do not know that he could.

Q. The lamps on the rear end of the train were nearer to the incoming engine than you were?

A. Yes, sir.

Q. But not quite so high up?

A. They were not high up and they were pointing straight back from the caboose; the caboose was one way on the curve and

198 the engineer was up here on the other. He could have seen me across the curve better than he could have seen the red lights.

Q. Do you think he could have seen them shortly after he saw your light?

A. He could have seen them as soon as he got part way around the curve.

Q. How near would his engine be to the caboose of the train you were on before he could see those lights at the rear end of the caboose?

A. I think he could have seen them from where I first saw him, but I would not swear positively that he could because it would be across and around the curve.

Q. If he did not see them then he would see them very shortly afterwards?

A. Yes, sir.

Redirect examination by Mr. CROTTY:

Q. It was a part of your duty to be on top of the train coming down the mountain?

A. Yes, sir.

Q. When did you last see these red lights?

A. I saw them all the way down the hill—the green lights, and when I could see the green lights I could see the red lights.

Q. When did you see them before the trains struck?

A. I do not know but I saw them after they struck.

Q. Do you know whether they were lighted after the collision?

A. They were.

Q. When did you see them before the collision?

199 A. I don't remember just where I saw them before the collision but the last time I looked back I saw the light.

Q. Don't lights frequently go out coming down the mountain?

A. They sometimes go out; it is an uncommon occurrence for the lights to go out on the caboose at any place.

Q. Is it not a very common occurrence?

A. It is not a common occurrence for them to go out unless they have burned all night, or have been burned a good while, then they are liable to go out, but they are never allowed to be out but a little while before some one notices them.

Q. They are in the habit of going out?

A. Yes; as a matter of fact I know they were lit. They were not lit after we struck, but they were lit after we struck and as soon as I went back to the rear they were burning.

Q. There was a cupola on the top of the caboose on the train you were on?

A. Yes, sir.

Q. How high was that above the level of the top of the caboose?

A. I should judge it was anywheres between three and four feet; probably as high as that railing (indicating), the side of it, and the center higher.

Q. What is the height of the top of the caboose compared with a box car?

A. Very near the same height; some are lower and some higher.

Q. Then the cupola would extend about three or four feet above the top of that car?

200 A. Yes, sir.

(By Mr. ALLEN:)

Q. You have been asked about that cupola on the caboose standing up some distance above the top of the caboose; I will ask you whether that was in the way or between where you were standing on the train and the engine that was approaching or whether it was looking across the curve?

A. I will explain that to you. I was three cars ahead of that cupola and we were on a curve and the engine that was approaching us was off here (indicating) coming around the point of another curve. The cupola or cars would not prevent a man seeing across and seeing my signal.

Plaintiff rests.

Evidence on Behalf of Defendants.

Dr. —— ESSIG, a witness called on behalf of defendants, being first duly sworn, testified as follows, to wit:

Direct examination—questions by Judge MCBRIDE:

Q. Where do you reside?
A. Spokane.
Q. What is your profession?
A. Physician and surgeon.
Q. How long have you resided here?
A. Since 1886.
Q. How long have you followed that profession?
A. Twenty-five years.
Q. Are you a graduate of an institution?
A. Yes, sir; the University of Pennsylvania.
201 Q. Do you occupy any position in this State in the medical fraternity?
A. I do not know that I do any more than a regular practitioner.
Q. Are you connected with the medical association of the State?
A. Yes, sir, as a member.
Q. Are you the president of the society?
A. Yes, sir.
Q. You were present and heard the examination of the plaintiff in this case?
A. No, sir.
Q. Are you acquainted with the plaintiff in this case?
A. I saw him yesterday for the first time.
Q. Did you make an examination of him with a view of ascertaining his condition?
A. So far as I could yesterday.
Q. State what you did and what purpose you had in view in making the examination and go on and state the symptoms in your conclusions.
A. I would have to state in the first place that the examination could not be made perfect yesterday, a complete examination, a

thorough examination could not be made, but in so far as we could we made an examination of the patient.

Q. State why you could not make a complete examination.

A. The exceeding trepidation apparent of the party was such that we could not make the examination, and he would not permit us to do it; that was particularly with regard to electrical
202 tests. Outside from that there was no unwillingness on the part of the patient up to that time. That is due him to state that.

Q. I will ask you to state what importance you attach to the tests which you proposed to make?

A. That was in regard to the responses of the muscles as to whether or not there was any paralysis. Our examination was to ascertain what his condition was or is at the time, and the object of the electrical tests was to test the response of the muscles to electricity as to whether there was paralysis.

Q. What importance do you attach to an examination of that kind—is it better than any other?

A. It is perhaps the best test in that respect that we have.

Q. That test if you could have made it would have been absolute on that question?

A. We hoped it would be because if the muscles responded promptly to the irritation of the current we would have known with certainty that there was life and action there; there might have been some deterioration and yet responses, but there would not have been paralysis.

Q. State what you did.

A. We made our examination in so far as possible. Before we could, however, get to the examination of the heart, lungs, liver, kidneys, etc.—use the electrical tests that we wanted to make of the muscles—the patient would not allow us to get very near him with it. We all tried it, his attorneys and physicians, but we could not apply the pole of the battery to him at all. In so far as we made the examination we found him exceedingly nervous and
203 irritable, in so far as his nervous system is concerned—what is commonly called a "neurasthenic" patient, that is, a weakened condition of the nerves. The responses in so far as we applied them gave no evidence of any degeneration or diseased condition of the nervous system outside from the prostrated or weakened condition of the system.

Q. How did you find his system outside from this particular?

A. We could not get a specimen of his urine to ascertain the condition of his kidneys. The excitement was such that an examination of the other organs was not made because we were getting through with the muscular and nervous systems first and then going to the other organs. The slight elevation of temperature which we found amounted to one hundred and one-tenth, an average being ninety-eight and six-tenths. We found the temperature one hundred and one-tenth. His pulse was somewhat increased in frequency and his pupils dilated somewhat.

Q. The average temperature is about ninety-eight degrees?

A. Yes sir.

Q. What is the frequency or does it frequently occur that the temperature varies?

A. It is not at all infrequent for it to.

Q. Does it necessarily indicate a condition abnormal when you find it varying from that?

A. No sir, it does not. There is a variation of sometimes running even higher than that to 101, which does not necessarily indicate disease.

Q. A person may be in good health and still maintain that temperature?

204 A. Yes.

Q. Did you examine him with a view of ascertaining what was the difficulty?

A. We examined him with a view or ascertaining his condition.

Q. And you describe him as being in a nervous and prostrate condition?

A. Yes, of nervous prostration, what we call hysterical if applied to a woman. The term applies to a condition in a woman which a man does not possess but hysterioid would be more accurate. Hysterics, I suppose, every member of the jury knows what we mean by that as the most of them have witnessed women who were exceedingly nervous and whose nervous system was badly wrecked, which is sometimes the result of uterine disease. It was called hysterics in the first place because it was supposed to be caused by an abnormal condition of the womb. Sometimes there may be no such condition there but fright, improper nutrition, improper nourishment and anxiety may produce that condition. Constipation of the bowels may do it and varying conditions may bring about that condition.

Q. Did you examine this man with a view of ascertaining the condition of his head in the region of the supposed injury?

A. Yes: we examined his head. There is seemingly some little thickness over the point of injury, seemingly a little lump upon the table of the skull.

Q. That is on the exterior?

A. Yes sir.

Q. Is there any local indication of any inflammation going on in that vicinity?

205 A. I did not discover any.

Q. Go on and refer to any symptoms that you saw that were traceable to any sources to which you attribute it?

A. There are innumerable causes that may produce a nervous condition, fright, improper nutrition, injury, and you can go through the whole list and anything that will impair the nourishment of the nervous system will produce that condition, whether it be an injury or whether it be a disease of some other portion of the body.

Q. Finding a person in this condition, reduced, emaciated and evidently all out of sorts, you would look to ascertain the cause and then any sources which you found?

A. The point is to ascertain and interrogate every organ in the body until you find some diseased condition which might bring this about. In many cases we cannot arrive at a definite conclusion.

Q. Did you examine his limbs and body generally?

A. Yes, sir.

Q. And examined his spine?

A. Yes, sir.

Q. What indications did you find of any injury to those parts?

A. There was nothing that pointed to any injury of any of the parts that I could discover. There is no evidence of any.

Q. State if you are able by any diagnosis that you gave his case yesterday to determine what was the cause of the condition in which you found him?

206 A. No, sir; I could not simply from the fact that we did not get the opportunity of making a thorough investigation of the condition of the lungs, heart, liver, intestinal canal, kidneys, etc. He could not give us any urine. He could not pass any water, and that is the only method of determining that.

Q. Did you see anything there that would enable you to attribute with any degree of certainty the condition he was in to the alleged injury on the side of the head?

A. No, sir; there was nothing about that or in the condition of that part which would justify the assertion at this time that his condition results from that.

Q. You saw the spot where it was alleged he was injured?

A. Yes, sir.

Q. What would be the effect upon the nervous system of such an injury as that was described to be, supposing that it produced the result that is claimed, that is inflammation at the point?

A. Supposing that it produced inflammation there might be a great many results.

Q. Would it produce any results such as would have been able to be detected by an examination of this man?

A. It might produce the condition in this man if there was any inflammatory condition.

Q. If this blow produced the result would it be likely to be manifested mentally?

A. It might. The site of the blow is here, the seat of mentality; that portion of the brain where mentality resides.

Q. Did you make any examination of him with reference to his mental powers?

207 A. Only in the conversation in the examination.

Q. Did you ask him any questions with reference to determining his powers of memory?

A. No sir; I did not except in regard to his family history, and he seemed to be somewhat defective in that. However, that is not infrequent in persons when we get to inquiring into the family history.

Q. Was not his memory in that respect quite up to the average?

A. I do not regard the man mentally as an average man.

Q. I am speaking now about his recollection of an arbitrary fact.

A. Almost I would say quite an average.

Q. He seemed to respond in that respect as an ordinary man would?

A. Yes; perhaps as well as an average man.

Q. Do you undertake to say that he exhibited any symptoms of mental decay or mental disease?

A. He impressed me more as a man of very limited mental power. The general expression of the man would indicate that without any investigation at all. The appearance of the man indicates that.

Q. You did not see any evidence of mental decay or deterioration?

A. No sir, I did not. I could not say that without having known the man and known what he was before this time and to compare the two conditions.

Q. To what do you attribute his especially excessive fear?

A. Now you are asking me for an opinion?

Q. Yes?

208 A. Well, he acts very much to me like a man who has been well educated, who has been taught his lesson.

Q. In other words, he understood what would be result of that examination and knew that it was a test?

A. Well, that was the way I was impressed

Q. State whether that test which you proposed to make through the battery was not the one which of all others was most likely to disclose his actual condition.

A. Only in so far as the paralysis of the muscles was concerned; beyond that numerous others. The popular idea in regard to electricity is that it is something wonderful and mysterious and might reveal more than it actually does.

Q. What would be the effect of it in applying it to the muscles?

A. If the muscles are in a healthy condition it would cause a response; if they are not there would be a failure of response.

Q. And one that the patient could not resist?

A. Yes sir.

Q. Did you see any indications there of brain lesions or brain lesion?

A. No sir; I did not.

Q. How would such a condition be manifested?

A. It might be manifested variously. If the injury to the brain was directly beneath there we would not expect any impairment of sensation or motion, if it extended beyond that part over the motor centers of the brain, if it controlled the motion of the hand or the motion of the arm or the leg, we would expect that part was involved and motion would be lost there; there would be

209 paralysis of the muscles. If it was a portion of the brain controlling the sensations, we would expect the sense of feeling would be impaired or destroyed. Of course, then, we have other conditions where there is excessive sensitiveness of the skin where sensation is increased rather than diminished, so unless there is a distinct condition we cannot say what the result would be. We

have to know what the condition is before we can say what the symptoms will be.

Q. If the injury was confined to this portion of the brain where the injury was said to have been inflicted, and did not extend anywhere else, would it affect the nervous system generally?

A. We would not expect it to. It is more nearly located over the portion of the brain supposed to control speech and language; not to paralyze the tongue but to cause a loss of words; he might be as likely to say one word as another and not get the right word. It is nearer that portion than any other, although it is law for that.

Q. Where is the portion of the brain which would most readily bring about the indications you found in this man provided there was an injury to the brain; an injury to the limb and weakness of the grasp?

A. The lesion would be about here (indicating) if there was a weakness of the hand; the hand center is about there.

Q. It would be in a different region from where this injury was?

A. Yes; but the symptoms do not correspond with the condition that there would be if you found that diseased condition; all the symptoms taken together do not correspond. For instance,
210 the various reflexes are just about normal as they are in health and not indicating a diseased condition which we would find. In some portions the reflexes are increased and in some portions destroyed. It depends upon where these things are located.

Q. You made an examination of the spine?

A. Yes, sir.

Q. Did you examine it for the purpose of ascertaining whether there was any ability or inability to respond to particular movements?

A. We examined the spine for sensibility to see whether there was acute sensibility, or whether there was simulated or natural sensibility or whether it was lessened.

Q. In that examination how did you find them?

A. The sensitiveness was seemingly increased. He complained of more pain than he would if a man in health. Very much like a nervous hysterical woman when you will find the spine exceedingly tender so that they will almost jump out of the chair if you press upon it. The greatest tenderness was upon the dorsal and lumbar just above the junction. Then again up just about the last of the vertebræ of the neck and where that and the back joins.

Q. State if this injury inflicted here would have caused that tenderness—is there any such connection between an injury inflicted at the point where he complains — a tenderness at the spine that would enable you to trace that effect from that cause.

A. I did not know what the extent of the injury was at the
211 time, not having seen him before. There may be an injury or a jar of the brain which will bring about this general weakened condition of the nervous system and with that weakened or hysterical condition there may be that tenderness all over the body because there is no conceivable condition that hysteria may not simulate.

Q. And is not it very liable to do it?

A. Oh, it does it. It is not only liable but it does simulate every disease.

Q. I will ask you to state whether in your opinion any of this weakness or ailment of which he complains are or are nor simulated—what is your judgment?

A. I would not be willing to express an opinion after a single examination because I would not do the man an injustice. I can only say what I said before, that his actions and all evidenced to me that he has been having some very good instructions. Now, I want to state in regard to instructions—particularly where damage suits are liable,—

Objected to; objection overruled.

In suits where damages are liable to arise and particularly in claimed injuries of the nervous system, it is one of the rarest occurrences for the nervous system to receive the so-called concussion. Persons who are asleep at the time of the accident and are not impressed by fear or anything of that kind almost invariably escape the so-called concussion of the cord, brain and nervous system in general. In children where the nerves of the spine predominate, it is almost unheard of that so-called concussion produces the serious results which are the substance and foundation of damage
212 suits. And a man by reading—the self-suggestions or auto-self-suggestions—that is, suggestions to one's self from the act of reading will lead one to imagine that there is a very serious condition, and the same may come from an outside source, for instance, frequent examinations by numerous physicians will impress—anything that will lead a man to be that simulation will enable him to obtain the results. Such cases are not at all infrequent. They are exceedingly frequent and most always recover after a settlement.

Q. I will ask you if you have given special study to that class of accidents as to the effect of injury upon the spinal system as a secondary result?

A. I am not a specialist in the profession; I am merely a common doctor but I have tried to give careful attention to this as well as everything else within my profession to the best of my very limited ability.

Q. When you examined his spine for the purpose of ascertaining whether there was any trouble of the spinal column of that vicinity what responses did he make, such as a healthy man would make or otherwise?

A. No sir; they were not such as a healthy man would make.

Q. Describe them.

A. That tenderness along the different portions of the spine is not a natural condition but it is a condition found in almost all nervous hysterical conditions, male or female. There is scarcely a female, perhaps not one out of five, that pressure along the spine will not give her a severe pain; particularly those who are not in good health and who are nervous and hysterical.

213 Q. I will ask you to explain whether his responses were such as would naturally result from a diseased condition or were they such as might have resulted from simulation of the symptoms?

A. I do not believe the man is wholly simulating. I believe that man is a neurasthenic. I think he has a weakened condition of the nervous system. It is a functional disturbance in so far as the nervous system performing its duty naturally.

Q. You are not able from this examination that you gave to locate its cause?

A. No, sir; because the examination was not completed. The examination of his lungs, heart, liver and kidneys was far from being complete. In fact he became so exceedingly hysterical and crying that we just abandoned—as you attorneys on both sides know that.

Cross-examination by Mr. HYDE:

Q. I will ask you if you are acquainted with the work "Annual Universal Encyclopedia Medical Sciences" by Sijou, vol. 2, of the year 1889?

A. Yes, sir.

Q. Is it a reliable work?

A. It is a compilation of different writers, some parts are reliable and others not. It is a compilation of the literature of the year.

Q. How about this book, "The International Encyclopedia of Surgery," published by the Appletons?

A. It is a standard work upon surgery.

Q. How does this work of Ranney's stand?

A. It is a very good work?

Q. These are standard works?

214 A. Yes, sir; I will say, however, that since the publication of Ranney's works upon the nervous system, and since the publication of the International Encyclopedia of Surgery by Ashhurst, that the views in regard to the concussions of the nervous system have undergone a very material change in the medical profession. Experimental researches and observations have changed these very materially and they have not thoroughly *chr*ystal-ized yet.

Q. You refer to the work of Page?

A. Yes, sir.

Q. Have you seen the work of Clevinger?

A. Yes, sir.

Q. It is one of the latest?

A. Yes; but Clevinger belongs to the same class as Ericson and Page. They are special pleaders upon both sides. Clevinger's is the later work. It has been intimated, how truly I do not know, that it is supposed that influences, even on so great a name as that of Ericson that were not of the best were brought to bear to induce him to assume the positions he did not assume in his work in 1865, revised in 1870 and again 1882.

Q. And the greatest names in medicine and surgery are subject to moneyed influences like the great names in law?

A. That which we may believe today may be controverted—statements may be temporarily accepted as demonstrated facts.

Q. Influences and the extraordinary power of money reaches those men and they write somewhat under the influence one way or the other?

215 A. I do not know; it has been attributed only to Mr. Ericson more especially, and yet there is one of the greatest names.

Q. You remember the case of Beaumont?

A. Yes; the crowbar case?

Q. Yes?

A. Beaumont's was not the "crowbar" case.

Q. The "crowbar" case I have reference to did not that upset those theories?

A. No sir; it is since that case that the motor senses have been located.

Q. He lived with one whole side of the brain taken away?

A. Large portions of the brain may be taken away and yet the patient live.

Q. Do you know this book "Thomas' Medical Dictionary"?

A. Yes sir.

Q. That is a reliable work?

A. One of the good dictionaries but not the best. It is a good dictionary but it does not rank with the best.

Q. One of the symptoms that was lacking or the principal one so far as you examined that was lacking to show that this man was affected and had the usual conditions that would follow an injury to the brain was what you call reflex tests?

A. That was not lacking.

Q. The test shows that paralysis was not there?

A. There is no one symptom in any disease that we know of which is positive evidence of the existence of that disease.

216 There is no disease in the whole range of medicine where one symptom will prove conclusively the presence of a disease or the absence of it.

Q. But that led you to believe there was no paralysis more than anything else?

A. No, sir.

Q. Taking this cut—the injuries to the brain that would produce the visible effect upon the motor muscles of the arm or leg would be received at a point further back?

A. That cut is correct.

Q. It is supposed that if an injury was received at the place marked "leg" it would affect the leg?

A. Yes.

Q. What would be the effect?

A. Paralysis; that would depend upon the extent of the injury but there might be a permanent contraction but that is where it would respond.

Q. And from an injury over here you would not expect these ordinary symptoms?

A. Over the immediate site thus supposed to be is the place where mentality resides, and there are no centers of motion located there.

Q. As a matter of fact science so far in medical surgery knows less about that portion of the brain than any other part?

A. They know less about that than any other part. They know less about that portion of the brain—they have not discovered anything but mentality there. They have located mentality there because when injured there the thought brain power is impaired.

Q. With reference to this examination, I will ask you if it is
217 not true that all of his attorneys were there and Dr. Harvey and both did everything in their power to have him submit?

A. They did.

Q. You believe they acted in good faith?

A. I have no reason to question it.

Q. You do not mean to be understood to say that he was not perfectly willing to submit to anything?

A. There was no evidence that he was not willing except this great fear and that I do not say is not an excited condition attributable to this impoverished nervous power because he is a man whose nervous system is impaired.

Q. Did not he in fact act about like a child who was crying?

A. Like a hysterical woman.

Q. The man mentally is not right or sound?

A. I discovered evidence of unsoundness of the mind. I discovered a man of very little intellectual power, I think.

Q. Is it not a fact that he went in there and did not know which of you surgeons were for or which against him?

A. I do not know anything about that. I never saw the man and never heard of the case before. I know nothing of that.

Q. You say you think that man is a neurasthenic?

A. Yes, sir.

Q. Could not that condition he was in have been produced by a blow on the head?

A. As I stated before, it might be.

Q. You are a surgeon for The Northern Pacific Railroad Company, the defendant in this action, in this city?

218 A. Yes, sir.

(By the COURT:)

Q. Suppose the testimony to be true as to the fact of his having received a bruise on the side of the head at the place indicated which without causing any fracture of the outer skull formation had caused an internal hemorrhage—that is, inside of the skull, causing blood to flow and form in a clot and harden, what would be the probable effect of that blood inside of the skull?

A. Blood generally becomes absorbed after it is diffused and decomposed and we have a formation of pus following it, and any pressure whether by hidden blood or any inflammatory action might produce various conditions. It might produce the condition

he is in and if it was limited to that portion where it would not involve the motor centers, the centers of sensation, the probabilities are that it would occasion impaired intellectual power.

Q. If such were the case could any operation of surgery at this time afford him any relief or benefit?

A. Without evidence greater than there is of any pressure which I claim there is no evidence at present of pressure susceptible to me—without evidence greater than that it would be malpractice to undertake an operation.

(Mr. HYDE, resuming:)

Q. I will ask you if it is not a fact that at the time you failed to induce the plaintiff to submit to the test of the electrical apparatus or battery that the hour of two o'clock had arrived and senior counsel had to leave there and we left the matter with you?

219 A. There was no effort on the part of any one to object to the fullest examination by the attorneys or physicians of the patient until it came to the electrical test.

Q. Have you renewed your request to continue the examination this morning?

A. I have not but I should have liked to do that because I would like to know whether the elevation in temperature was due to some disease which could be discovered upon some more careful examination. If it is a disease of the kidneys it would cause all these nervous condition- perhaps.

Q. As a surgeon for the defendant why did you not suggest that you would like to go on with it this morning?

A. I am not the attorney in this case. I came on merely when requested to make an examination. I did not ask to get into this case, and it would have been much more agreeable not to come into it, but I state the facts as I find them for or against either party.

Q. Is it not a fact that I left before this examination was broken up?

A. Yes; but the man's condition became such that it would have been absurd to continue it at that time, and the management of the case is in the hands of the attorneys, and whether they get a judgment for or against is nothing to me.

Dr. J. J. BUCKLEY, a witness called on behalf of the defendant-, being first duly sworn, testified as follows:

Direct examination by Judge MCBRIDE:

Q. Where do you reside?

220 A. Missoula.

Q. What is your profession?

A. Physician and surgeon.

Q. What business are you engaged in at Missoula?

A. In charge of the Northern Pacific Beneficial Association and also engaged in general practice.

Q. How long have you been engaged in the practice of the profession?

A. Since 1878.

Q. Have you graduated in medicine?

A. Yes sir; at the College of Physicians and Surgeons in New York.

Q. And you have been engaged in the practice ever since?

A. Yes, at Delhi, New York, at Fargo, North Dakota, and a short time at St. Paul.

Q. How long have you been in charge of the railroad hospital at Missoula?

A. Since the latter part of 1887.

Q. Have you been in the habit of examining the patients and persons injured in railroad accidents?

A. Yes sir.

Q. Do you know this plaintiff?

A. Yes sir.

Q. When did you first see him?

A. On the 16th day of October he came into the hospital.

Q. In the last year?

A. Yes; 1892.

Q. State what his condition was at that time?

221 A. On an examination of him in the morning by two of us, we discovered upon the left side of his parietal region a small lump and contusion. He also had a slight bruise on the region of the left hip and the anterior part of the leg and some scratches upon his face.

Q. State his condition generally.

A. We made a careful examination of him at that time as we always do, of his heart, lungs, etc., and could not discover evidence calling for any operative interference necessary and the man was not sent into the ward, and I am very positive was never in bed at all, but was enabled to go about during all the time he was in the hospital. In fact, I know that he was out daily walking about the town.

Q. What was his condition at that time as to general health?

A. He seemed to be in very good condition.

Q. And he remained about a month?

A. He remained until November.

Q. What development or progress did the injuries appear to make?

A. They did not appear to have made any, and on three or four occasions we examined him and could discover nothing, and I informed the doctor that while it was not necessary for him to remain in the hospital, yet at the same time that we would be sure of not doing the man an injustice and keep him there, and finally he was discharged. In fact, he wished to go himself.

Q. Did you see him again after that?

A. Yes; I examined him, both of us, thoroughly the afternoon before he left.

Q. State what his condition was at that time.

222 A. We could discover nothing whatever in his condition and nothing to indicate any difficulty with him except he

was finding fault and complaining all the time he was in the hospital and very impatient about things.

Q. I will ask you to state whether during that time he was making any threats or said anything about complaints against the company?

A. Not that I know of.

Q. What did he say if anything about it at the time he left?

A. At the time when he left he came into the office in the afternoon. We had an office in the box car and the doctor and myself were sitting at the desk, and I asked him to be seated, and he walked about up and down the car, and I asked him what was the trouble, and he muttered something that I could not understand. I told him if he would remain still a moment we would fix him out and he said something about being protected by his lodge and the Great Northern. I did not ask him what it was or anything of that kind, but he started for the door, and as he went to the door I was sitting alongside of, I said "Hold on a minute," and put my hand against him, and said, "You cannot go away unless you have a discharge certificate. You can go, of course, but you cannot go to work and you need a pass to get back on," all of which was made out and given him.

Q. You detained him for that purpose?

A. Yes, sir.

Q. Did you take hold of him rudely?

A. Not in any way.

223 Q. Did you hear his testimony?

A. No sir, I did not.

Q. You asked him to remain until you could furnish him with the papers which were for his benefit?

A. That is the customary thing. He receives transportation and his discharge certificate.

Q. And he was impatient?

A. Yes; and while he was in the Sisters' hospital he complained about the food. At that time we were in the Sisters' hospital in Missoula, not in our own building.

Q. What is the fact in regard to where you were keeping your patients?

A. We burned out on the 6th day of April and we had to move all our men to the Sisters' hospital.

Q. State whether you kept him there because his injuries appeared to you to be such as to require him to remain in the hospital or otherwise?

A. We kept him in the hospital as any patient is kept in that comes with an injury; oftentimes I am satisfied that a man could go to work when we ask him, but when he says he does not feel able, that he has a pain here or there, we say, "Very well" and let him remain longer.

Q. What did this man say about his condition at the time he left?

A. He did not say anything about his condition.

Q. He did not complain at being discharged?

A. No sir; in fact he wanted to leave.

Q. And you furnished him with his discharge so that he got his pass back?

A. I gave him the transportation right there.

Q. When next did you see him?

224 A. I never saw him again until I saw him here.

Q. You say you had him in your charge for about a month, until the 17th day of November and he came there on the 16th day of October?

A. On the 12th of October, I think it was.

Q. And he was in your charge during that time?

A. Yes.

Q. State to the jury what was his injury as it appeared at that time to you?

A. The injuries all that we could determine was that this man had received a contusion upon the side of his head and bruises along the region of his hip and down his foreleg and the bruises on his face. In other words, that he had suffered a shake-up like anybody receives from being thrown violently down and which takes some time to efface.

Q. State whether or not the injuries had disappeared at the time he left and what was his condition when he went away?

A. He seemed to be perfectly able—in our opinion he was able or we would not have discharged him. He was able to go about all the time he was there and he did do so.

Q. He was never confined to his bed at all.

A. I do not think he was, or if he was it was not more than 12 or 24 hours. But I am very positive that it was not that as a general thing. In many cases even where parties come to us who have not been injured, yet to be upon the safe side of things which is a great thing in medicine and surgery, we ask them to be quiet.

Q. You conversed with this man at the time he came there?

225 A. Yes, sir.

Q. You have seen him since and heard him talk?

A. Yes, sir.

Q. What difference do you perceive between his condition when he first came and his condition now so far as intellectual powers are concerned?

A. He was always nervous and excitable, and in the condition at which I saw him yesterday at which were present all the doctors and attorneys, he gave us great evidence of a very nervous, hysterical condition.

Q. He is now in a very nervous, hysterical condition?

A. Yes.

Q. What is the difference mentally between the condition he was in then and now?

A. I cannot determine that he is in any different mental condition than before that. There was nothing which would at that time have caused any attention to his mental condition.

Q. Did you see any condition then of his brain having become disturbed?

A. No, sir.

Q. Did he complain then of pains in his head?

A. No, sir; that was a peculiarity of the whole case. In fact, we could not elicit from him that he had pains anywhere. The principal pain that he complained of was being bothered with cold feet, and it was remarked upon in his case in the hospital book. Time and again we examined him and asked him if he had a pain here or a pain there and we could not find any.

Q. State what manifestations of temper, of good temper or bad temper he manifested?

226 A. He is a very quick, nervous temperament, extremely so.

Q. You were present at the examination yesterday?

A. Yes, sir.

Q. Did you take any part in it?

A. No, sir; except beyond the fact I saw the examination.

Q. Who was it that conducted it?

A. Dr. Essig.

Q. You heard the questions that were asked of him by the doctor?

A. Yes, sir.

Q. And the answers that he made?

A. Yes, sir.

Q. And you saw what was done and the examination that was made?

A. Yes.

Q. Did you listen and observe with a view to ascertaining what the man's condition was and what was the cause of it?

A. Yes; that was the object of the examination.

Q. Did you hear him state to the doctors the manner in which he was hurt?

A. Yes.

Q. Now, taking it all into account, everything that was said and done there, are you able to express an opinion as to whether his present condition, taking it as you found it, is the result or not of the injury which he claims to have received at the time of the accident?

A. No, sir; because a thorough examination was not made of the man. No examination is complete of any man for any cause

227 whatever without an examination primarily of his urine for albuminum or sugar, and for a disease which very often affects the heart and brain and for some of the causes which produce diabetes.

Q. What was his condition in that respect when he was in the hospital?

A. All right. Examinations were made of all persons who were lying in bed or who had beyond a mere laceration or contused wound which showed on the face of them. No patient is even given an anæsthetic without an examination of the urine.

Q. What evidence is there if anything you have seen at any time of any inflammation or injury to the brain in this case?

A. I do not see that his condition is such as to result from any

inflammatory action. This hysterical or neurasthenic condition is a functional disorder of the nerves and not organic.

Q. If his condition was the result of that injury would there not be some means by which you could detect it?

A. Not always. It is possible for a man to present this condition and be due to this cause.

Q. But if this were the cause in this case—if this cause was originally this hurt here and the effect of it has been such as to bring about the condition that he is in, would not you be able to ascertain logically and positively?

A. Not always; but at times if there is any serious injury to the brain, for instance, from a blow or the bursting of a blood vessel producing hemorrhage—hemorrhage always produces its result at once manifested by paralysis of either the lower or upper ex-
228 tremities, or in whatever part of the brain that blood may be diffused or poured out, thus acting upon those centers which control the legs, arms, speech or whatever it may be.

Q. If there was such a blow as to produce inflammation at that point, would not it have been manifested when he was in your hospital?

A. It certainly would have been and he would have more phenomena, if he had any inflammatory action other than he had, because the temperature is taken twice a day, night and morning.

Q. It *is* now been nearly a year since. If the inflammatory condition has continued, would it not have manifested itself at some time in some way so that it could be detected?

A. It would seem so, yes sir.

Q. Can you from anything you have seen during this examination and your knowledge of this case, trace it or say that it is owing to that blow?

A. No, sir; I cannot. It may be due to heredity, syphil*i*s or dozens of causes of impairment of nutrition, or cold or exposure, or rheumatism, or it may follow as a sequel of any of the fevers, or as a result of an attack of la grippe in which the nervous system has manifested all forms of disorder.

Q. If I understand you correctly, there is nothing in this case that enables you to attribute it to this injury?

A. No sir.

Q. And your knowledge of this injury induces you to think that it is not attributed to that?

A. I don't think it is, but as I stated before, it is not im-
229 possible for an injury or a blow to produce in a person that condition of affairs, but it is as a rule in these nervous, unstable people who are worked upon and told that they are not right or well or something of that kind. In other words, like hundreds of people who imagine themselves to be a great deal worse off that they are.

Q. They are sick because they think so?

A. People are sick from that cause, yes.

Q. A physician upon the stand this morning described this afflic-

tion in this case as pachy-meningitis; do you know of such a disease?

A. Yes; it is a comparatively rare disease.

Q. State if you saw in this patient any evidence of its existence and if so what?

A. I did not in my opinion see evidence of pachy-meningitis in this man. It is a disease which affects the duramater of the brain—that is, the membrane which lies on the anterior part of the skull and also a part of which the brain rests upon in the back part.

Q. If he were suffering from such an inflammation or from such a disease would pressure upon that point indicate it?

A. Yes; if there was sufficient of the inflammatory matter.

Q. Is it likely that if this inflammation was the result of that injury at that time that it would have continued to the present time with no more serious manifestations in the meantime?

A. Pachy-meningitis may do that.

Q. It may be slow in its development?

A. Yes; like any chronic disease, it may exist in different stages of development.

230 Q. Is that generally the result of such injuries?

A. No, sir, it is not.

Q. It is because it is the result of some other origin?

A. As a rule, yes.

Q. Is not this form of disease frequently so secret that it is not even discovered during lifetime and only disclosed after death?

A. Yes.

Q. Its approach is so subtle and difficult of detection in its origin that it frequently is not discovered until a post-mortem examination discloses it?

A. Yes; the reason of that is this, that, for instance, when a man comes to a physician for a disease, he is expected to have confidence in his physician and explain to him, and if a man comes who has pains in his head of an indefinite kind, or a chronic, and is not relieved by ordinary attacks of medicine, and we give the medicine which absorbs that or has a specific effect upon it, we know at last or are strongly suspicious of syphilitic origin. If a man lies to us it is impossible to say, but if he tells the truth that he has had the syphilis we can beyond question of doubt say that this pain localized in this condition is due to this cause, the syphilis has a particular tendency to attack the bones and the covering of the bones.

Q. When you discharged this man, did you discharge him as cured?

A. Yes; the data on our hospital book shows recovery.

Q. And you regarded him as capable of going to work?

A. Yes.

231 Q. I ask you, in response to a suggestion by Dr. Essig, whether the plaintiff in this case admitted that he once had been afflicted by a private disease?

A. Yes, sir.

Cross-examination by Mr. HYDE:

Q. He stated that it was the clap?
A. Yes, sir.
Q. But that is not syphilis?
A. No, sir.
Q. He said it was 7 or 8 years ago?
A. I think that is what he said.
Q. He was perfectly willing to answer every question?
A. He seemed willing.
Q. He seemed perfectly willing to submit to anything that he had nerves and strength enough to submit to.
A. I don't know as to his nerve and strength. He submitted to everything and anything that we wanted or asked until the electrical machines were produced.
Q. He did take one handle of the machine?
A. I do not know; I did not notice that, but he evidenced a willingness to do everything that was asked.
Q. Gonorrhea is not a constitutional disease?
A. No, sir; but it leaves some diseases which remain constitutional sometimes. Not constitutional as remaining in the constitution, but it produces lesions or results.
Q. It does not produce brain lesion?
A. No, sir; but it produces severe eye troubles.
Q. Gonorrhea and clap are the same disease?
A. Yes, sir.
232 Q. And he said that was 7 or 8 years ago?
A. Yes, sir.
Q. And had had it about a week?
A. I don't remember that.
Q. And had a physician to cure it right up?
A. I think he said that.
Q. What is the condition of this man physically?
A. I should say this man is in a condition of neurasthenia.
Q. You do not know of the cause?
A. No, sir.
Q. He is not in a condition of health?
A. I could not say he is not in a condition of health.
Q. Suppose he had been a brakeman and was standing on a flat car and a box car came up and he was in a position stooping to couple them and there was a rear-end collision and he was struck on the head and knocked thirty feet into the rocks; if that was the case and he was found now in this condition, would it be reasonable to attribute that condition to that injury?
A. Not necessarily.
Q. Would it be liable to injure his spine, a fall of thirty feet on the rocks?
A. He might fall 130 feet and not hurt his spine.

By Judge MCBRIDE:

Q. What would be the probable effect upon the ear of a man

being struck so hard that he was knocked thirty feet by a collision—what would be the effect on the car and track?

A. I do not know; I am not a car doctor.

233 Dr. POMEROY, a witness called and sworn on behalf of the defendant-, testified as follows:

Direct examination by Judge MCBRIDE:

Q. What is your profession?
A. Physician and surgeon.
Q. How long have you been engaged in that calling?
A. About twelve years.
Q. Where have you resided?
A. I have resided about nine and one half years in Cheney
Q. Have you practiced your profession there?
A. Yes, sir.
Q. Were you educated to your profession?
A. Yes, sir.

Mr. HYDE: We admit his qualifications.

Q. Are you acquainted with the plaintiff in this case?
A. No, sir.
Q. Have you seen him?
A. I saw him yesterday; never before.
Q. Were you present at an examination where Doctor Essig was the principal examiner with a view to ascertaining his condition?
A. Yes, sir.
Q. Did you observe what took place there and see what was done?
A. Yes, sir.
Q. With what view were you present?
A. With the view of ascertaining the true condition of the man's health.

234 Q. With the view of determining whether his present condition was the result of the injury which it was alleged that he had received?

A. Yes, sir.
Q. You heard his history of the facts?
A. Yes; part of it.
Q. And heard the answers that he made to the questions propounded to him by Dr. Essig?
A. Yes, sir.
Q. And saw the experiments that were made to ascertain his condition?
A. Yes, sir.
Q. Did you take part in that examination?
A. Yes, sir.
Q. I will ask you to state from that examination whether you saw or found any evidence of brain lesion from the symptoms and other facts that you discovered there?
A. I found the patient suffering from a run-down condition of the

nervous system, from some cause or other. No special brain lesion and no organic lesion that I could discover of the nervous system.

Q. If his condition was the result of that injury on that occasion state what evidence there would be of it?

A. Of course, an injury might possibly produce conditions of that kind, and it would be impossible to state.

Q. What evidence did you find there that this had produced it?

A. I found no evidence that it was produced by an injury.

Q. Are there other things that might have produced his present condition and been the cause of it?

235 A. Yes, sir.

Q. You may state to the jury any of those things which might have brought about the condition in which you found this man.

A. I should have strongly suspected without any previous history of the case that the man was suffering from a sequel of the grippe and had not entirely recovered from it. The symptoms he has are about the same as that disease frequently leaves. We did not make a thorough examination, as Dr. Essig stated, because the patient behaved so badly we could not do it. When we undertook to use electricity, it seemed to disturb him very much.

Q. So your examination was not a thorough one?

A. Not as perfect as it should be to find out what the trouble was.

Q. What evidence was there or is there in his case of any inflammation of the brain or any portion of it?

A. I do not see any indication of any active inflammation of the brain.

Q. You heard the description he gave of his private disease?

A. Yes.

Q. From his description are you able to determine whether it was or was not constitutional?

A. Well, we had some time in drawing him out for the facts in the case. He said he had a running sore and finally he stated, I believe, that it lasted him about a week, and that he was treated for it, and he finally stated that it was the clap or gonorrhea; that is what he said about it.

Q. State whether or not he said it was a running sore?

236 A. I think he said it was running; he seemed not to understand the doctor's interrogation very perfectly, he was a little flustrated probably.

Q. If this man was suffering from an inflammation which was the result of an injury a year ago, and had been during all this time I will ask you to state whether there would not be some indication of it at the spot other than you find.

A. The external indications, on the outside of the skull there might not be. The external indications of an injury are very slight in my opinion.

Q. They may be very slight?

A. The external indications of an injury are very slight so one would hardly notice them at all without the attention being called to it.

Q. Is there anything in this case?

A. There is no external indications that there is any serious injury that I could discover.

Q. Were the symptoms which he described, that is, the pains which he said he had had and the suffering which he described, such as might be attributed to any one of the other causes which may have caused the results, like the grippe?

A. Yes; it might be produced by that; a man of his nervous condition who has his mind constantly concentrated upon himself and his ailment and trouble and the future possibility of obtaining a verdict, might really imagine that he suffered pain.

Q. Was there anything in the examination there that indicated to you that this man was either simulating or might be deceiving himself in regard to his affliction?

237 A. Yes; he overdrew the matter very much yesterday.

Q. State in what particulars.

A. Usually a man will overdraw any feigned symptoms. The nervous excitement that he underwent yesterday, or seemed to undergo, when we were attempted to use the battery, were very markedly overdrawn in my estimation compared to what they would have been if they had been his true nervous condition.

Q. You are the physician at Cheney for the railroad company?

A. I am local surgeon for the beneficial association which belongs to the Northern Pacific Railroad Company, but it is a side issue. It belongs to an association of the employés.

Q. You have charge of persons who are injured on the railroad and generally take care of their sickness?

A. Yes, sir.

Q. How long have you been in that position?

A. About nine years and a half.

Cross-examination by Mr. HYDE:

Q. Now is it not true that the patient was more willing that you should examine him, and in fact turned towards you for protection against his lawyers and Dr. Buckley?

A. Yes; he seemed to behave as if he was afraid of Dr. Buckley. I did not attribute any good to that.

Q. You disagree with the other two surgeons who were at

238 that examination, Dr. Buckley and Dr. Essig and their statements that he was perfectly willing to answer every question and submit to every test?

A. Excepting the battery he did. As soon as they brought the battery in, he refused to take that examination.

Q. You disagree with them in their opinion that he was unable to take that test and was afraid to and could not do it?

A. It seemed that he did not.

Q. You disagree with them in their statement that he could not do it?

A. I think he would not do it. I believe the patient was more or less embarrassed undergoing an examination in the presence of so many people.

Q. Do you pretend to say that that man is in health?
A. No, sir.
Q. Suppose this man had received an injury such as has been testified to and was struck on the head and was thrown a distance of thirty feet and struck on the rocks, unless you found some other cause to produce this condition would not you look to that cause to produce it?
A. It might produce it.
Q. But if you were informed of no other and could ascertain no other, would not you attribute it to that injury?
A. I might.

Redirect examination by Judge McBRIDE:

Q. Do you with the knowledge which you have of this case attribute this man's condition to that injury?
A. No, sir.
239 Q. Might not his condition be the result secondarily in this way, that being unwell and being very anxious to recover from the railroad company, might not that desire and bad nutrition and anxiety and all that bring about the result which you find in this man now?

Mr. Hyde objected to the question that it is not proper redirect examination, and second that it is leading.
The COURT: I do not think it is proper redirect examination but is a part of the case in chief, but I will allow defendant to ask the question as a part of the case in chief.

A. It might.
Q. Is not that quite as likely as that it is the result of the original injury?

Mr. Hyde objected to the question because it is leading and not proper redirect examination.
Objection overruled.

A. I think it is. That together with perhaps his habits.

Recross-examination by Mr. HYDE:

Q. I will ask you if it is not a fact that he said in your presence and hearing that he would not take hold of that battery, that he was afraid it would kill him, and he would rather lose his case and never try it and struggled to keep away from it?
A. Yes; and shed tears.
Q. He was urged strongly by Dr. Harvey and Mr. Crotty and myself repeatedly and time and again?
240 A. Yes, sir.
Q. And we took hold of it ourselves in order to demonstrate it to him?
A. Yes, sir.

Redirect examination by Judge McBRIDE:

Q. Was there any attempt on the part of yourself or Dr. Essig to alarm him or dictate to him in any way there to terrify him?

A. Not necessarily.

Q. The attorneys on the other side did not have anything to say?

A. No, sir; they were very anxious to have him use the battery and tried to persuade him that it would not do him any harm, but the more they urged him the worse he got.

Q. And he finally broke down and commenced to blubber?

A. Yes, sir.

Recross-examination by Mr. HYDE:

Q. Is that manifestation of his breaking down in that way the act of a healthy man or a man with a good mind?

A. No, sir; it was not the act of a healthy man but it may have been the act of a hysterical patient.

Q. Was it the act of a man of proper and sound mind?

A. No, sir; a man of a sound mind could not be afraid of it; he said that when he was well he had taken the battery but now it would kill him.

241 Dr. ESSIG recalled by defendant.

Direct examination by Judge McBRIDE:

Q. Did I understand you to state this morning that this man could not have taken that battery?

A. If I did I don't remember it. I did not intend to make any such statement.

Q. You did not say that he could not?

A. I don't know that I said that he could not or would not, but I said that he did not.

Cross-examination by Mr. HYDE:

Q. Didn't I understand you to say that he seemed perfectly willing to do that, but he seemed unable to do it?

A. I think the stenographer's notes will show that I said that up to the time of the bringing in of the battery he seemed perfectly willing to our making the examination, but at that time he became exceedingly nervous and we could not proceed further with our examination. I think that is about what the stenographer's notes will show.

Q. One of those batteries if strong enough might be an instrument of death?

A. Electricity strong enough might kill a man. The current, however, that we were using upon him only affects superficially. It is not like the galvanic current.

Q. You don't know whether he knew that or not?

A. I don't know that.

(Mr. ALLEN:) We desire to read to the jury rules Nos. 129
242 and 339 of the Book of Rules of the Northern Pacific Railroad Company heretofore introduced in evidence.

Defendant- rests.

Plaintiff's Rebuttal.

F. A. RESSOR, a witness called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. HYDE:

Q. At the time of the accident that has been the subject of investigation on this trial, you were a conductor in the employ of the Northern Pacific Railroad Company?
A. Yes, sir.
Q. You were the conductor of the train which we have for the purposes of this trial called the second train?

Defendants' counsel objected to the testimony as not being proper in rebuttal.
Mr. HYDE: We wish to show that there were no lights at the rear end of this car and that there was no flagman.
The court stated that the testimony was part of the case in chief.
Objection sustained and witness withdrawn.

NARCISSE POIRIER, plaintiff, recalled.

Direct examination by Mr. HYDE:

Q. I will ask you if you ever had the syphilis? Do you know what syphilis is?
243 A. I had the clap.

Objected to; objection overruled.

Q. Have you ever had the syphilis or the disease called pox?
A. I had the clap.
Q. I ask you if you ever had the pox?
A. No, sir.

(By Judge MCBRIDE:)

Q. Do you know the difference between these different diseases?
A. No, sir.

(Mr. HYDE, continuing:)

Q. Tell the jury what you did have.
A. The clap.
Q. How long ago was that?
A. About eight years ago.
Q. How do you know it was that?
A. It was running.
Q. Who told you it was that disease?

A. Some of my friends.
Q. What did the doctor tell you it was?
A. I went to see the doctor and he gave me some medicine and in a few days more it was well.
Q. How long did it last before it was well?
A. I don't remember that very well.
Q. How long do you think?
A. I don't remember, to tell the truth.
Q. Do you think it lasted a week?
A. This running?
Q. Yes.
A. Four or five days, or something like that.

244 Q. I will ask you if anybody has taught you about testifying here on the stand?

Objected to; objection overruled.

Q. Has anybody taught you, have your attorneys or physicians taught you, about testifying and what kind of a story to tell?
A. No, sir; nobody ever did say a word to me.
Q. Nothing except your attorneys asked you what you know about it?
A. They never told me what to say, nothing of that kind.
Q. Has anybody outside or any other person?
A. All what I say is the best I know.
Q. Nobody told you about it?
A. No, sir; I swear to that.
Q. State if you knew which doctors were for or against you at the examination yesterday?
A. Dr. Harvey is my doctor.
Q. You don't know about the others?
A. No, sir.
Q. Only Buckley?
A. I knew Dr. Buckley.
Q. Why didn't you take hold of the battery?

Objected to; objection overruled; to which ruling defendant excepted.

Q. Tell the jury why you would not take hold of the battery yesterday?
A. I was afraid it would kill me. I am not strong; I used to take it when I was well and it used to be a pretty good thing

245 to take to see how strong you were. I told one doctor there, "For God's sake don't let the other doctors do that on me; they want to kill me." And he said something, I don't know what it was, but they stopped.

Cross-examination by Judge McBRIDE:

Q. Do you think Doctor Harvey was willing to kill you?
A. I could not understand any more.

Q. Didn't you know that Doctor Harvey was your friend?
A. Yes.
Q. Didn't he ask you to submit?
A. I could not depend upon anybody. I was afraid.
Q. Did your attorneys ever read any books to you in reference to your case?
A. Not that I remember.

Mr. HYDE: I will offer these books in evidence for the purpose of reading from them to the court and jury, the books that have first been identified by the surgeons as being books of established reputation, the dictionary, the International Encyclopædia of Surgery and especially Gray's Anatomy and the work of Sijou.

The COURT: I will admit them on the same ground that I admitted the testimony of Doctor Harvey and other doctors upon scientific question, simply as a matter of general information and not as testimony or as authority on questions of science.

Mr. HYDE: We will offer in evidence page 99 of this book, which is designated as "Life Tables," showing the expectancy of human life.

246 Judge MCBRIDE: We desire to have it appear that both parties having rested, the defendants come and request the court to instruct the jury that there is no evidence in this case showing negligence on the part of the defendants such as to make them liable in any sum to the plaintiff, and that the defendants are entitled to a verdict.

Recess taken until 8 o'clock p. m., for argument on defendants' motion for a verdict.

Evening Session—8 o'clock p. m.

Judge MCBRIDE: We are just in receipt of a notice and affidavit together with a motion, which if counsel for plaintiff is to present, should be heard before the court hears any argument upon the motion for a verdict.

Mr. Hyde then presented and read to the court a notice, affidavit and motion to reopen this case and introduce further testimony on behalf of plaintiff.

Mr. HYDE: We think we ought to be allowed to reopen the case and introduce this witness Ressor, with the right to answer his testimony on the part of the defense. I ask that we be allowed to recall this witness and be allowed to establish the fact set forth in the affidavit and motion.

Judge MCBRIDE: Is it not a fact that this witness is here and has been for three days under your subpœna?

Mr. HYDE: If he is I did not know it.

247 Judge MCBRIDE: Here are the præcipes in which his name is contained, but I do not find any return to the subpœna; but the witness says he was here upon their subpœna.

Mr. HYDE: It is very possible that he was subpœnaed by us, but if he is, I did not know it and none of plaintiff's counsel knew that he could testify to these facts.

Judge McBRIDE: We think that having deliberately closed their case, the mere fact that we did not undertake to give any testimony at all, and did not ask a question of a single witness, in regard to the circumstances of the accident, they should not come here now and say they are su-prised because we did not do so and because we did not undertake to explain the facts of the accident.

The COURT: I think the parties ought to have at least one fair trial of the case, with a full and complete opportunity of developing all the facts. I am going to decide this matter this way, that I will grant this application unless the defendants show me that some material witness whom they require and who has been here cannot be produced tomorrow.

Court thereupon adjourned until 9.30 a. m. tomorrow.

SATURDAY, *September* 23, 1893—9.30 a. m.

The court met pursuant to adjournment.

Judge McBRIDE: Counsel for plaintiff have agreed with me that what they propose to show shall be understood to have been given in evidence by the witness Ressor. It is as follows, as stated in the affidavit filed by counsel for plaintiff: "That it will be shown
248 by said witness Frank Ressor that he was conductor of said second train and that he was given no notice that the first train would stop at Clyde spur." We admit that the witness would have so testified; we propose to call no witnesses to controvert that fact and it may be treated as his testimony.

Arguments were then made to the court by counsel for defendants and plaintiff upon defendants' motion that the court instruct the jury to return a verdict for the defendants

The COURT: I think this is a case for the jury to decide and will therefore deny defendants' motion.

Mr. ALLEN: We will ask an exception to the ruling of the court.

The COURT: An exception will be allowed.

And this was all the evidence given in the case.

Service of the foregoing by copy admitted this Oct. 25, 1893, Spokane, Wash.

JAMES L. CROTTY,
HYDE, GLASS & REAGAN,
Pl'ff's Att'ys.

Rules read from the book of rules by consent of parties, book dated March 29th, 1891, and in force at time of accident.

Book received in evidence and following rules read therefrom:

Rules Read on Behalf of Plaintiff.

Rule 133. When a train is stopped by an accident or ob-
249 struction, the rear brakeman must immediately go back with danger signals to stop any train moving in the same

direction. At a point fifteen telegraph poles from the rear of his train he must place one torpedo on the rail; he must then continue to go back at least thirty telegraph poles from the rear of his train and place two torpedoes on the rail, ten yards apart (one rail length), when he may return to the point where first torpedo was placed, and he must remain there until recalled by the whistle of his engine; but if a passenger train is due within ten minutes, he must remain until it arrives. When he comes in, he will remove the torpedo nearest to the train, but the two torpedoes must be left on the rail as a caution signal to any following train.

If it becomes necessary to protect the front of the train, the front brakeman must go forward and use the same precautions. In case of necessity the fireman will be required to act as flagman.

Rule 134. When a flagman is sent out to signal any approaching train, he must, if possible, avoid stopping on a curve, or behind any obstruction, endeavoring to pass beyond the same, should such exist, and reach a position where he can be clearly seen from the approaching train, for at least one-fourth of a mile. The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs from want of any precaution that could have been taken.

Rule 156. When any section of a train is unable to make the specified time, the conductor will drop a man with danger
250 signals to warn the following train. It is the duty of the conductor of every train, when the train stops for any cause, to immediately protect the rear end of his train as per rule 133. No understanding with the conductor of the following train will relieve you of this duty.

Rule 158. Trains will be run under the directions of the conductor, except when such directions conflict with these rules or involve risk or hazard, in which case the engineer will be held equally responsible. No train shall leave a station without a signal from its conductor.

Rule 164. Conductors and engineers will be held equally responsible for the violation of any of the rules governing the safety of their trains, and they must take every precaution for the protection of their trains, even if not provided for by the rules.

Rule 165. In all cases of doubt or uncertainty, take the safe course and run no risk.

Rule 228. It is the duty of dispatchers to hold following sections of trains, when they are known to be running too close, and keep them the prescribed time and distance apart, and in stormy weather the utmost care must be exercised in blocking the sections a safe distance apart.

Rule 229. Meeting points, when it is possible to avoid them, must not be permitted on the mountains. A passenger train can pass an inferior-class train already on the mountains, but it is better, when possible, to avoid even this, and permit only one train at a time on the hill.

251 Rule 341. After making up or adding to a train, or after a

change of engines, the rear brakeman shall ascertain whether the brake is connected throughout the train.

Rule 342. All conductors will be at their trains, at terminal stations, thirty minutes in advance of their leaving time per time-table, and by their personal attention insure leaving promptly on time.

Rule 343. Conductors will be held responsible for the safe management of their trains and for the strict performance of duty on the part of the men engaged with them. In order to secure effective work, conductors must make themselves familiar with the duties required from other train employés, and see that they are fully performed.

Rule 346. If a conductor discovers anything wrong with the track, bridges or culverts, which would be likely to cause an accident to a following train, he must not rely wholly upon the telegraph to notify other trains, but must leave a flagman, in addition to telegraphing.

Rule 390. Brakemen are under the orders of the conductor.

Rules Read in Behalf of Defendants.

Rule 120. A train must not leave a station to follow a passenger train until five (5) minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending, under
252 any circumstances, until such trains are duly reported at next telegraph station. Freight trains must not follow each other descending mountain grades. They may ascend in sections when handled with mountain power in rear. Descending passenger trains may follow freight trains, as per rule 121. Ascending passenger trains will not leave station at foot of mountain until track is known to be clear.

Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting and passing points) unless some form of block signal is used.

Rule 129. All trains must approach the end of double track and junctions prepared to stop, and must not proceed until the switches or signals are known to be right, and the track is plainly seen to be clear.

All trains must come to a full stop at all draw-bridges and railroad crossings at grade, and sound two short blasts of whistle before proceeding.

Rule 339. Regular trains twelve hours or more behind their schedule time lose their rights.

(Endorsed:) No. 159. In United States circuit court, district of Washington, eastern division. N. Poirier, plaintiff, *vs.* Northern Pacific Railroad Co., defendant. Bill of exceptions. Filed Oct. 25, 1893. A. Reeves Ayres, clerk. James O'Neill, dep'y.

And afterwards, to wit, on the 5th day of December, 1893,
253 there was duly filed in said court, in said cause, a motion for new trial, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
NORTHERN PACIFIC RAILROAD COMPANY *et al.*, Defendants. } No. —.

Motion for New Trial.

Come now the defendants herein and respectfully move the court for a new trial upon the following grounds, to wit:

First. Because the verdict of the jury is contrary to law.

Second. Because the verdict of the jury is contrary to and not supported by the evidence.

Third. Because the verdict of the jury is excessive.

Fourth. Because the damages assessed by the jury are excessive and appear to have been rendered under the influence of prejudice or passion.

Fifth. Because in the trial of said cause the court erred in permitting plaintiff's witness Jesse J. Allen, over the objections and exceptions of the defendants, to answer the following question propounded to him by plaintiff's attorney, to wit: "Q. I will ask you what his condition is now, and has been at the times you
254 have seen him since, compared to what it was before the accident, as to his health and physical condition." Answer. "I didn't consider him an able-bodied man, and I do not consider him fit, nor competent to do any kind of railroad business."

Sixth. Because on the trial of said cause the court erred in permitting the plaintiff's witness Dr. Powers, over the objections and exceptions of the defendants, to answer the following question propounded to him by plaintiff's attorney, to wit: "Q. State your opinion as to the probable future of this patient (meaning the plaintiff) from the effects of this condition and its duration and course in the future." Answer. "I think that from a continuation of this subacute or chronic inflammation that softening of the brain will ultimately result. That is one thing—perhaps paralysis might be another that would result."

See Transcript of Testimony, p. 91.

Seventh. Because the court in the trial of said cause erred in permitting the plaintiff's witness Lee Bates, over the objections and exceptions of defendants, to answer the following question, to wit: "Q. What was his (meaning plaintiff's) physical condition compared to his health and strength at the time you were acquainted with him before the accident?" Answer. "I judge he was 20 or 25 pounds heavier at the time he worked for me than he is at present."

See Transcript of Testimony, page 94.

Eighth. Because the court erred in refusing to give to the
255 jury in charge the following instruction, to wit: "In this case there is no evidence that the defendant, The Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that if there was any negligence, it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants;" to which refusal of the court to give such instruction the defendant then and there at the time excepted.

Ninth. The court erred in refusing to give to the jury the following instruction requested by the defendants, to wit: "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train, in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or engineer of the extra train, then I instruct you that the defendants are not liable, and that you should return a verdict for the defendants;" to which refusal of the court to give such instruction the defendants then and there at the time excepted.

Tenth. The court erred in giving to the jury the following instruction, to wit: "Whoever is placed by the employer in the
256 position where he has the responsibility and the right and power to supply these means of safety, and to guide the operation of dangerous agencies, whether he is conductor on a freight train, or a superintendent, or the train-dispatcher, or whoever is clothed with that power and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects.

Now applying that general principle to this case, if the evidence shows you that the conductor of either one, or both of these trains, was clothed with authority to control the movement of the trains without any restriction upon their judgment and discretion, if they were placed there to exercise judgment and discretion with power to control the movements of those trains and charged with responsibility for accidents that might occur through neglect to observe proper precautions, and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operations of the trains, then whoever else did have that responsibility and power would be the one representing the company;" to the giving of which instruction the defendants then and there at the time duly excepted.

Eleventh. The court erred in giving to the jury the following instruction, to wit: "Now it is not charged that there was any
257 negligence in the management of the first train except the

negligence of the conductor; and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that;" to the giving of which instruction the defendants then and there at the time duly excepted.

Twelfth. The court erred in giving to the jury the following instruction, to wit: "If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence of the case as a special or extra train called a wild train, running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendant to have some one in the control of the operations of trains on that road to prevent that train from coming into collision with the regular trains on the road, and whoever was charged with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train or any one else in authority to control the movements of the trains running over that piece of road;" to the giving of which instruction the defendants then and there at the time duly excepted.

ASHTON & CHAPMAN AND
JNO. R. McBRIDE,
Attorneys for Defendants.

(Endorsed:) Original. Narcisse Poirier, plaintiff, *v.* North-
258 ern Pacific Railroad Company *et al.*, defendant-. Motion for new trial. Service by copy admitted, waiving all objections as to the time of filing the motion. Dec. 2d, 1893. Hyde & Reagan, attorneys for plaintiff. Filed Dec. 5, 1893, in the U. S. circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterwards, to wit, on the 9th day of May, 1894, the same being the 28th judicial day of the regular April term of said court—present, the Honorable Cornelius H. Hanford, United States district judge, presiding—the following proceedings were had in said cause, to wit:

In the Circuit Court of the United States of America for the Ninth Circuit, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as Receivers of the Northern Pacific Railroad, Defendants.

This cause having come on regularly heretofore, to wit, on September 21st, 1893, for trial, the said plaintiff appearing by
259 his attorneys, Messrs. Hyde, Glass & Reagan, and James L. Crotty; and the defendants appearing by their attorneys,

Messrs. McBride & Allen and Messrs. Ashton & Chapman; thereupon before this court therefor, and a jury of twelve persons having been regularly impanelled, selected and sworn to try the cause, and the plaintiff having given thereat the testimony in his behalf, and the defendants having given the testimony in their behalf, the said trial having proceeded regularly upon the said 21st day of September, 1893, and regularly thereafter upon the 22d and 23d days of September, 1893, and said cause having on said 23d day of September, 1893, been submitted to the jury for their consideration, said jury retired to consider of their verdict and subsequently returned into court and rendered a verdict in favor of the said plaintiff and against the said defendants for the sum of $21,600, which said verdict was thereupon regularly filed and entered by the clerk of this court in this cause;

And the said defendants by their said counsel thereupon made a motion before this court for a new trial of this cause, and said cause having been regularly called for argument upon the 30th day of April, 1894, in this court, and the court having listened to the argument of counsel upon said motion, and having duly considered the same and being sufficiently advised in the premises, and considering the verdict of the jury aforesaid excessive, and considering that the said verdict should be reduced to the sum of $7,500, thereupon allowed the plaintiff until this day to elect whether he would accept said reduction or submit to a new trial of this cause,

and the plaintiff having elected to accept said reduction
260 and allow a judgment for $7,500 to be rendered in his favor:

Now therefore on motion of plaintiff by his said attorneys in consideration of the law and the premises, it is by the court—

Considered, ordered and adjudged, that defendants' motion for a new trial be and the same is hereby overruled in all things.

And it is further considered, ordered and adjudged that plaintiff, Narcisse Poirier, do have and recover of and from the defendants, The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, the sum of seven thousand five hundred ($7,500) dollars, and his costs herein taxed at $— and that he have judgment therefor, and hereof let execution issue.

Done in open court this 9th day of May, 1894.

By the court.

May 9th, 1894.

C. H. HANFORD, *Judge.*

(Endorsed:) In the circuit court of the United States for the ninth circuit, district of Washington, E. div. Narcisse Poirier, plaintiff, *vs.* The Northern Pacific Railroad Company *et al.*, defendants. Judgment. Filed May 9, 1894, in the U. S. circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterwards, to wit, on the 14th day of June, 1894, there
261 was duly filed in said court, in said cause, petition for writ of error and assignment of errors, in the words and figures as follows, to wit:

In the Circuit Court of the United States for the Ninth Circuit, District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THE NORTHERN PACIFIC RAILROAD COMPANY, a Corporation; Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, Receivers of the Northern Pacific Railroad, Defendants.

Petition for Writ of Error.

To the honorable the judges of the circuit court of the United States for the ninth judicial circuit, district of Washington, eastern division:

Comes now the defendants above named and considering themselves aggrieved by the decision and judgment of this court herein, made and entered on the 9th day of May, 1894, attach hereto, and make a part hereof, their assignment of errors; and pray for a writ of error from said judgment to the United States circuit court of appeals for the ninth circuit, and that said writ, and citation thereon may be issued herein, and a transcript of the record and proceedings, upon which said judgment was rendered, duly authenticated, be sent to said court of appeals.

262 *Assignment of Errors.*

First. The court erred at the trial of this cause in refusing to give to the jury at the close of the testimony the following instruction, to wit:

"In this case there is no evidence that the defendant, The Northern Pacific Railroad Company, was guilty of any negligence which caused the accident by which plaintiff was injured, or which contributed thereto, and that if there was any negligence, it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

For the reason that the testimony in the case supported the facts as claimed to exist by said instruction, and the refusal to give the same was therefore error.

Second. The court erred in giving the following instruction to the jury, and each and every part of the same:

"Whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety, and to guide the operation of dangerous agencies, whether he is conductor on a freight train, or a superintendent, or the train-dispatcher, or whoever is clothed with that power and charged with that responsibility, is deemed in law as the represent-

ative of the employer, and the employer is responsible for his acts and his neglects.

263 "Now, applying that general principle to this case, if the evidence shows you that the conductor of either one, or both of these trains, was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion, if they were placed there to exercise judgment and discretion with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions, and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company."

For the reason that there was no testimony in the case to show that any other person or persons than those operating the extra train were at fault, unless it were the plaintiff himself, and that an instruction which, as did this, authorizes the jury to conclude that some other person connected with the operation of these two trains was responsible, was erroneous.

Because, further, the second paragraph of said instruction, inasmuch as it submitted to the jury to find whether the conductor of either of the trains was clothed with an authority to control the movements of the same, "without any restriction upon their judgment and discretion," and whether they were charged with

264 the responsibility for accidents that might occur through neglect to observe proper precautions, and in such case allowed the jury to conclude that they represented the employer, and their neglect would fasten the responsibility on the defendants; which is erroneous.

Said instruction is erroneous further in authorizing the jury to find that if the conductors of either of the trains mentioned were not occupying the position of agents of the corporation, and responsible for the management and operation of the trains, that they might find any one else who was responsible for the accident, and thus render the defendant company liable to the plaintiff.

The instruction is objectionable because it would make the defendant liable for the act of the conductor or engineer of the second train to the plaintiff, who is employed on another and different train, which is against law.

It would make the defendant company liable for an injury which might have occurred without the neglect of either the conductor or engineer, or any person connected with the running of either of these two trains which collided, and would necessarily make every railroad accident negligence presumably on the part of the company, or railroad, unless it could be shown that the plaintiff himself was the cause of the accident. Under this instruction that must necessarily be the result. We claim it is therefore erroneous.

It is further objectionable and error because it does not
265 require that negligence shall be fixed upon any particular person, or even located by the jury at all. For under this instruction, if some agent of the company was the cause of the accident, the company would necessarily be liable, and if it did not have such agent to be responsible, then it was negligence in not having such agent, which we insist is erroneous.

Third. The court erred in giving to the jury the following instruction:

"Now it is not charged that there was any negligence in the management of the first train except the negligence of the conductor; and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that."

The same being subject to the error charged in the last specification above.

Fourth. The court erred in its instruction given to the jury in the following words:

"If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence in the case as a special or extra train, called a wild train, running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendant to have one in control of the operation of trains on that road to prevent that train from coming into
266 collision with the regular trains on that road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train, or any one else in authority to control the movements of the trains running over that piece of road."

The first error in this instruction is that it submits to the jury that there was a wild train running under special orders as to the time it was to make, where it was to go and when it should reach the different stations, and it was the duty of the defendants to have some one in control of the operation of trains on that road to prevent the train from coming into collision with the regular trains. Because this instruction implied that there was evidence to show that this was a wild train, running under special orders, whereas there was no evidence on that subject, and the jury had no right to infer that there was.

The testimony showed that this was an extra train, but ample provision was made in the testimony for the running of this extra train by the rules, and the instruction which required that special control should have been shown to free the defendants from the imputations of negligence were unwarranted and erroneous.

And because the instruction in allowing the jury, not only to find against the defendant in case the conductor of the second train, or the engineer of that train, were in fault in regard to the accident, or whether it was the fault of some other person not disclosed by

the evidence, whom the jury might consider ought to have
267 control of these trains so as to prevent a collision, it is equally erroneous.

And because the instruction authorized a finding of negligence occasioned by any one of half a dozen persons, and the jury would not be required under such instruction to concur in locating the neglectful instrument or act.

Fifth. The court erred in refusing to give to the jury the following instruction:

"In determining the question of whether the defendant, The Northern Pacific Railroad Company, was guilty of negligence in the management of *their* trains, or either of them, the jury are instructed that they may consider the rules of the company which have been read in evidence, and that if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants."

Because said instruction embodied the law as applicable to the facts of this case, and the defendants were entitled to have the same given to the jury, or the equivalent thereof, and the failure so to do was error to their prejudice.

ASHTON & CHAPMAN AND
JNO. R. McBRIDE,
Defendants' Attorneys.

268 *Order.*

The foregoing petition having been presented with the assignment of errors, and it appearing that the petitioner is entitled thereto, it is ordered that the writ of error be and it is hereby allowed as prayed.

June 13th, 1894.

C. H. HANFORD, *Judge.*

(Endorsed:) Filed June 14th, 1894. A. Reeves Ayres, clerk.

And afterwards, to wit, on the 14th day of June, 1894, there was filed in said court, in said cause, an appeal bond, in words and figures as follows, to wit:

Bond on Writ of Error.

In the Circuit Court of the United States, District of Washington, Eastern Division.

Know all men by these presents, that we, the Northern Pacific Railroad Company, and Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, as receivers of the Northern Pacific railroad, as principal-, and G. G. Chandler and Geo. P. Eaton, as sureties, are held and firmly bound unto Narcisse Poirier, in the full and just

sum of five hundred ($500.00) dollars, lawful money of the United States, for the payment of which, well and truly to be made,
269 we and each of us, hereby bind ourselves, our heirs, executors, administrators and assigns, jointly and severally firmly by these presents.

Sealed with our hands and dated this 12th day of June, A. D. 1894.

The condition of the foregoing obligation is such that: Whereas in the above-entitled court, in an action pending therein between Narcisse Poirier, plaintiff, and The Northern Pacific Railroad Company, a corporation, Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of the Northern Pacific railroad, defendants, judgment was, on the 9th day of May, 1894, rendered in favor of said plaintiff and against said defendants, for the sum of seven thousand and five hundred dollars ($7,500) damages, and for — dollars, costs of suit, and,

Whereas, said Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, have obtained from said court a writ of error to reverse the said judgment in said action, and citation directed to said plaintiff citing and admonishing him to appear in the said court, to be holden at San Francisco, in the State of California, on the — day of —— next, has been issued.

Now, therefore, if said defendants, The Northern Pacific Railroad Company, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, plaintiffs in error, shall prosecute their said writ of error to effect, and shall answer all costs if they shall fail to make their plea good, then the
270 above obligation shall be null and void, otherwise it shall be and remain in full force and effect.

NORTHERN PACIFIC RAILROAD CO.,
By W. O. CHAPMAN,
Its Counsel, Duly Authorized.
THOMAS F. OAKES,
HENRY C. PAYNE, AND
HENRY C. ROUSE,
As Receivers of the Northern Pacific Railroad Co.,
By W. O. CHAPMAN,
Their Counsel, Duly Authorized.
G. G. CHANDLER. [SEAL.]
GEO. P. EATON. [SEAL.]

Attest:

—— ——.

Executed in the presence of—

W. L. JAHSE.
E. R. YORK.

STATE OF WASHINGTON, } ss:
County of Spokane. }

G. G. Chandler and Geo. P. Eaton, being first duly sworn, deposes, each for himself, as follows:

I am the person whose name is subscribed to the foregoing instrument as a surety thereon. I state that I reside at the county of Pierce, State of Washington, that I am a householder therein, and that I am worth the amount mentioned as the penalty in said bond over and above all my just debts and liabilities, and property which is not exempt from execution.

G. G. CHANDLER.
GEO. P. EATON.

271 Subscribed and sworn to before me this 12th day of June, A. D. 1894.

[SEAL.] E. R. YORK,
Notary Public in and for the State of Washington, Residing at Tacoma, in said State.

Approved:
C. H. HANFORD, *Judge.*

(Endorsed:) Filed June 14, 1894. A. Reeves Ayres, clerk.

And afterwards, to wit: on the 14th day of June, 1894, there was duly issued out of said court, in said cause, a writ of error in the words and figures as follows, to wit:

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the ninth judicial circuit in and for the district of Washington, eastern division, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in said circuit court, before you, between Narcisse Poirier, plaintiff, *vs.* The Northern Pacific Railroad Company, a corporation, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, defendants, a manifest error hath happened, as by their complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the
272 parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the ninth circuit, at San Francisco, California, together with this writ, so that you have the same at the said place within thirty days from the date hereof, in said court, to be there and then held, that the record and proceedings aforesaid be inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 14th day of June, in the year of our Lord one thousand and eight hundred and ninety-four, and of the Independence of the United States the one hundred and eighteenth.

[SEAL.] A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.

(Endorsed:) Service by copy of this writ of error admitted at Spokane, Washington, June 16th, 1894. Hyde & Reagan, plaintiff's attorneys. Filed June 14, 1894. A. Reeves Ayres, clerk, by James O'Neill, deputy.

And afterwards, to wit: on the 14th day of June, 1894, there was duly issued out of this said court in said cause, a citation, in the words and figures as follows, to wit:

273 UNITED STATES OF AMERICA, *ss:*

To Narcisse Poirier, Greeting:

You are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, State of California, within thirty days after the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Washington, eastern division, wherein The Northern Pacific Railroad Company, a corporation, Thomas F. Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, are plaintiffs in error, and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and speedy justice should — be done to the parties in that behalf.

Dated this 13th day of June, 1894.

C. H. HANFORD,
U. S. District Judge, Presiding in said Circuit Court.
[SEAL.]

Attest: A. REEVES AYRES,
Clerk U. S. Circuit Court, District of Washington.

(Endorsed): Service of the within citation by copy admitted at Spokane, Washington, June 16th, 1894. Hyde & Reagan, plaintiff's attorneys. Filed June 14, 1894. In the U. S. circuit court. A. Reeves Ayres, clerk, by James O'Neill, deputy.

274 In the United States Circuit Court for the District of Washington, Eastern Division.

NARCISSE POIRIER, Plaintiff,
vs.
THOMAS F. OAKES *et al.*, Receivers of the Northern Pacific Railroad Company, Defendants.

Order.

It is ordered that the time for filing the transcript of the record in this cause in the United States circuit court of appeals be and is hereby extended thirty days from this date.

Dated July 14th, 1894.

W. B. GILBERT,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
District of Washington, Eastern Division, } *ss:*

I, A. Reeves Ayres, clerk of the circuit court of the United States of America for the eastern division of the district of Washington, in the ninth circuit, by virtue of the foregoing writ of error and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to 246 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of The Northern Pacific Railroad Company and Thomas F.
275 Oakes, Henry C. Payne and Henry C. Rouse, receivers of the Northern Pacific railroad, plaintiffs in error, *vs.* Narcisse Poirier, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of said court to be hereunto affixed at the city of Spokane, in the eastern division of Washington, in the ninth circuit, this tenth day of July, in the year of our Lord one thousand and eight hundred and ninety-four, and of the Independence of the United States of America the one hundred and nineteenth.

A. REEVES AYRES, *Clerk,*
By JAMES O'NEILL, *Deputy.*

276 In the United States Circuit Court of Appeals, Ninth Circuit.

NORTHERN PACIFIC RAILROAD CO. *et al.*, Plaintiff- in Error,
v.
NARCISSE POIRIER, Defendant in Error. } No. 185.

In error to the circuit court of the United States for the district of Washington.

Ashton & Chapman and Jno. R. McBride for plaintiff in error, Aylett R. Cotton, S. C. Hyde, Jno. J. Reagan, W. S. Glass, and J. L. Crotty for defendant in error.

Before McKenna and Gilbert, circuit judges, and Hawley, district judge.

HAWLEY, *District Judge:*

On October 7, 1892, Narcisse Poirier, plaintiff (defendant in error), while in the employ of the Northern Pacific Railroad Company, defendant (plaintiff in error), and acting in the capacity of middle brakeman upon a regular freight train, designated as the first train, when it stopped at Clyde spur and while he was standing upon the rear end of one of the flat cars, about midway of the train, and engaged in the performance of his duty, in attempting to uncouple the cars, received certain injuries in a collision which then occurred by a second train running into and against the first train at the rear end thereof.

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For the injuries thus received the plaintiff obtained a verdict for $21,600.00, which was afterwards reduced, upon a motion for a new trial, to $7,500.

There is no conflict in the evidence as to the manner in which the collision occurred, but there is a direct conflict or difference of opinion between the respective counsel as to the deductions to be drawn from the evidence as to who was guilty of the negligence which caused the collision, whether it was the conductor of the first train or the conductor of the second train or some undiscovered vice-principal of the corporation.

It is conceded that the plaintiff was entirely free from any fault or negligence upon his part.

The assignments of error call in question the correctness of the rulings of the trial court in refusing to give certain instructions asked by the defendant and in giving other instructions in its charge to the jury touching the liability of the defendant and of its negligence in the premises.

To obtain a thorough understanding of the true meaning and effect of these instructions it will be necessary to state the facts relative to the position, condition, and manner in which the respective trains were being operated on the night in question. The collision occurred about midnight. The first train was a regular local freight train, running on schedule time, under the management, control, and direction of the conductor. The second train was

running under telegraphic orders, without any schedule or
278 time-card, known in railroad parlance as a "wild train."

At Moscow, a station on the railroad, the second train was standing upon the track when the first train left that station. At Vollmer, another station, the first train stopped to drop some cars. It was detained about ten minutes, when it resumed its course over the mountain grade. The second train was then in sight, standing on the track a short distance in the rear, with its lights plainly visible. Clyde spur, where the collision occurred, is about six miles from Vollmer. It is a place on the road where there is a spur track running out to a logging camp where saw-logs and cord-wood are loaded on the cars. There is a side track or switch upon which cars are left to be run out on the spur track. It is not a regular station, and the regular freight train only stops there when there are empty cars to be left or loaded ones to be taken away. The first train on the night in question had certain cars to be left at this place, and stopped there for that purpose. There were three brakemen on the train. The head brakeman, when the train was slowing up, left his place and started forward to open the switch. The rear brakeman at this time saw the second train rounding a curve in the road and immediately signalled it to stop, and at the same time shouted as loud as he could. The second train was then about one-quarter of a mile behind the first train. The first train had barely come to a full stop when the second train, moving at a speed of about four miles an hour, struck it by running the cow-catcher of its engine under the rear end of the caboose on the first train. The conductor of the first train had been lying down, but
was in his seat in the lookout of the caboose and passed out
279 of the rear end just before the collision occurred. The conductor of the second train had not been informed that the first train would stop at Clyde spur.

The defendant offered no evidence in relation to its care or negligence in running the respective trains, except certain of its rules which provide how its trains shall be run. Rule 120 provides that "a train must not leave a station to follow a passenger train until five (5) minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first-class trains descending under any circumstances until such trains are duly reported at next telegraph station. Freight trains must not follow each other descending mountain grades." * * *

This rule, it will be noticed, relates principally to passenger trains. Clyde spur is not a telegraph station.

"Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting and passing points), unless some form of block signal is used."

"Rule 129. All trains must approach the end of double track and junctions prepared to stop and must not proceed until the switches or signals are known to be right and the track is plainly seen to be clear."

Counsel for defendant contends that there is no testimony in the record to justify the statement that the second train was a wild train, running on telegraphic orders, without any schedule or time-card.

As some of the objections urged to the instructions are dependent upon this fact, it is deemed proper at this point to state the
280 facts as shown by the record and our conclusion in regard thereto.

The witness Allen, who was the rear brakeman on the first train, in answer to plaintiff's question, "Go on and tell all about the accident," said, "We done our work there," referring to the station where the first train stopped after leaving Moscow, "and went on down the hill, and they (the second train) followed with an extra or wild train, and it was running by telegraphic orders and had no schedule orders or time-card." Here the witness was interrupted by counsel for defendant asking, "How do you know? You need not state if you do not know." No answer was given by the witness. The counsel for plaintiff then said to the witness, "State what else you know about it." The witness proceeded to tell what occurred after leaving Vollmer.

Neither at that time nor at any other time was it shown that this witness had no personal knowledge of the manner in which the second train was running. There was no motion made to strike out his testimony upon the ground that it was hearsay or upon any other ground. He stated the fact as if it was within his knowledge, and there is no testimony that contradicts or tends to contradict the fact as stated by him. If his statement was not true, the defendant could easily have offered testimony showing what the facts were as to how the second train was being run or ordered to be run. It did not do so. Our conclusion upon this point is that the trial court did not err in stating to the jury that the second train was running by telegraphic orders, without any schedule or time-card.

281 The general principles of law, applicable to the facts of this case, concerning the liability of the defendant are few and simple and may be classed under three heads:

1. The conductor of the first train, within the rule announced in the Ross case, 112 U. S., 377, as limited and explained in the Baugh case, 149 U. S., 369, was the vice-principal of the defendant, and if the collision occurred through his negligence the defendant was liable.

2. The conductor of the second train was a fellow-servant with the plaintiff, and if the collision was caused solely by his negligence the defendant would not be liable.

(Randall *v.* Railroad Co., 109 U. S., 478; Railroad Co. *v.* Baugh, 149 U. S., 368; Railroad Co. *v.* Andrews, 50 Fed., 728; Railroad Co. *v.* Clark, 57 Fed., 129; Mase *v.* Railroad Co., 57 Fed., 286; Northern P. R. R. Co. *v.* Smith, 59 Fed., 996.)

3. The agent of the defendant, who was clothed with the duty of sending out the second train and giving the orders as to how it should be run, having the control, management, and direction of

its movements—whether such agent was the train dispatcher, master mechanic, division superintendent, or other agent of the defendant—was the vice-principal of the defendant, and if the collision occurred by his negligence the defendant would be liable.

Wilson *v.* Railroad Co., 48 Fed., 57; Railroad Co. *v.* Charless, 51 Fed., 362; Union P. Co. *v.* Novak, 61 Fed., 583; Hough *v.* Railway Co., 100 U. S., 214; Railroad Co. *v.* Herbert, 116 U. S., 642; Railroad Co. *v.* Baugh, 149 U. S., 368, 386; Railway Co. *v.* Daniels, 152 U. S., 684.

Did the court err in any of its rulings?

282 Is the charge of the court, taken in its entirety, in accordance with the general principles we have announced?

At the close of the testimony the defendant moved the court to give the following instruction: "In this case there is no evidence that the defendant The Northern Pacific Railroad Company was guilty of any negligence which caused the accident by which plaintiff was injured or which contributed thereto, and that if there was any negligence it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

The contention of defendant in support of this instruction is that it appears from the evidence that the collision occurred by reason of the conductor of the second train disobeying the general rules of the company, which required him to keep his train ten minutes behind the first train, and it is claimed that if he had obeyed this rule the collision would not have occurred; but this rule of the company must be taken in connection with rule 228, offered by the plaintiff, which declares that "it is the duty of dispatchers to hold following sections of trains when they are known to be running too close and keep them the prescribed time and distance apart," and of the further fact that the second train was running under telegraphic orders, without any schedule or time-card. It devolved upon the company to show that it had in all respects exercised due and reasonable care in providing for the safe running of the second train.

The court would not under the facts have been justified in
283 taking the case from the jury. The case should not have been withdrawn from the jury unless the conclusion necessarily followed, as matter of law, that no recovery could be had upon any view which could be properly taken of the facts which the evidence tended to establish.

Railway Co. *v.* Cox, 145 U. S., 594.

There were other questions in this connection not embodied in the instruction that should have been and were left to the jury to decide. It was a question of fact for the jury to determine from all the evidence whether the railroad company was guilty of any negligence in the management of the second train which contributed to the accident, and, if negligent, whether the collision would have occurred if the company had not been negligent in sending out the

second train without notifying the conductor thereof that the first train would stop at Clyde spur, which was not a regular station.

The mere fact that an injury to a servant was partly caused by the negligence of a fellow-servant does not relieve the master from liability therefor, if it clearly appears that the accident which caused the injury would not have happened had not the master himself been negligent. Grand Trunk Railway Co. *v.* Cummings, 106 U. S., 700; 7 Am. & Eng. Ency. Law, 828, and authorities there cited; Coppins *v.* Railroad Co., 25 N. E., 915; Town *v.* Railroad Co., 47 N. W., 665.

The instruction asked by defendant entirely ignored the question whether there was any negligence upon the part of the defendant in setting the second train in motion without any schedule or time-card as to how it should be run and in failing to notify the conductor of said train that the first train would stop at Clyde
284 spur, and whether the collision occurred by reason of such negligence. There was certainly sufficient evidence to justify the submission of this question to the jury. Upon this ground alone the court did not err in refusing to instruct the jury to find a verdict for defendant.

The defendant then asked the court to instruct the jury as follows:

1. "In determining the question of whether the defendant The Northern Pacific Railroad Company was guilty of negligence in the management of these trains or either of them the jury are instructed that they may consider the rules of the company which have been read in evidence, and that if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants."

2. "If the jury find from the evidence in this case that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or engineer of the extra train, then I instruct you that the defendants are not liable and that you shall return a verdict for the defendants."

The record shows that the court gave the first instruction as asked by defendant, adding thereto the following qualification: "Unless it appeared that the conductor of the train or some one under whose orders he was acting had authority in the special case to deviate from the rules." This qualification, under the
285 facts, was not erroneous. It was not necessary for the court in its charge to have repeated the second instruction asked by defendant. The principle that if the collision occurred by reason of the negligence of the conductor of the second train in disobeying the rules of the defendant the plaintiff could not recover substantially covers every proposition embraced in the second in-

struction, subject only to the qualification which was added by the court.

Was there any error committed in other portions of the charge? The court, after correctly stating the rule of law as to the liability of the railroad corporation for the negligence of its conductors and agents, its duty to its employés, and the risks assumed by its employés, among other things stated that the duty which an employer owes to his employés, whether the employer is a corporation or natural person, to provide proper means, facilities, and appliances for carrying on the work with reasonable safety cannot be so delegated to any subordinate or agent as to exempt the employer from liability to an employé if an injury happens to him through a neglect of that duty, "so that whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety and to guide the operation of dangerous agencies, whether he is a conductor on a freight train or a superintendent, or the train-dispatcher, or whoever is clothed with that power and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects."

The portion of this charge in quotation is objected to, but
286 we are of opinion that the principle enunciated therein is clearly within the third rule hereinbefore announced as a correct rule to be applied to the facts of this case, and that it is supported and sustained by the authorities cited in support of said rule.

The other portions of the charge to which exception is taken follows immediately after the portion quoted and may be classified under three heads:

1. "Now, applying that general principle to this case, if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movements of the trains, without any restrictions upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company."

2. "Now, it is not charged that there was any negligence in the management of the first train except the negligence of the conductor, and if the conductor was the responsible man in managing that train and he was negligent, the defendants are liable for that.

If he was not negligent, the defendants are not liable for this
287 accident. If he was not negligent, the defendants would not be liable for this injury by reason of its occurrence, and just so, if the proof fails to show this jury that the conductor had the power and responsibility to manage the trains, the defendants would

not be liable, even if he was negligent, because if he was acting in subordination to somebody else who had the power and controlled the operations of the trains, he would occupy the position of a fellow-servant to the plaintiff, and the defendants would not be liable for his negligent acts."

3. "If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence in the case as a special or extra train, called a 'wild train,' running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendants to have some one in control of the operations of trains on that road to prevent that train from coming into collision with the regular trains on the road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train or any one else in authority to control the movements of the trains running over that piece of road."

We here add another portion of the charge not objected to:

4. "Now, you will consider from the evidence in this case whether there has been any negligence on the part of any one having the authority and power and responsibility for the operation of
288 the road, as to the second train. If there was such neglect, the defendants are liable for the consequences to the plaintiff in this case of that neglect. If there was no such neglect of duty, there would be no liability and no ground upon which the plaintiff can insist that the defendants shall compensate him for the injury he has sustained."

In considering the portions of the charge to which exceptions are taken it may be conceded that sentences here and there may be found which, if separated from the context, where the correct principle is announced, might either be calculated to mislead the jury or, if standing alone, unaided or unexplained, in other portions of the charge, might be considered erroneous. But this method of construing a charge is unfair to the trial court. Its charge upon any particular subject must be considered in its entirety.

The question which is to be determined by the appellate court is not whether some technical error may not have inadvertently crept into the charge, but whether the charge when taken as a whole has presented the law of the case fully, fairly, and correctly to the jury. Crew *v.* Railway Co., 20 Fed., 94; Union P. R. R. Co. *v.* Novak, 61 Fed., 574, 588; Railroad Co. *v.* Horst, 93 U. S., 295.

Notwithstanding the severe criticism of the learned counsel for defendant as to the expressions of the court in certain portions of the charge, our conclusion is that the general principles of law applicable to the facts of this case, as we have heretofore announced them, were constantly recognized in the charge given by the circuit court. The charge of the court in its entirety is not fairly
289 susceptible of the construction sought to be placed upon it by counsel.

The jury evidently did not understand from the charge that the defendant would be liable for the negligent acts and conduct of the conductor or engineer of the second train. No portion of the charge was intended to convey any such meaning. All that is said about the conductors fastening responsibility upon their employer by their acts in subdivisions 1 and 3, when read in the light given in the other portions of the charge, refers to the status of the conductors with regard to their respective trains, whether under the facts they were to be considered as vice-principals of the master or fellow-servants with the other employés. This is made perfectly clear. In subdivision 2 the court told the jury that if the conductor of the first train was the responsible man, the vice-principal of defendant, in managing that train and he was negligent, the defendant would be liable for his negligence; that if he was not negligent, the defendant would not be liable; and further on the court told the jury that if the conductor of the first train did not have the entire charge, power, and responsibility of managing the train, the defendant would not be liable, even if the conductor was negligent, because if he was only running the train in subordination to somebody else, who had the power and authority to direct the movements of the train, "he would occupy the position of a fellow-servant to the plaintiff, and the defendant would not be liable for his negligent acts."

This same idea is again announced in subdivision 3 with reference to the conductor of the second train.

Who was the person that had the charge and responsibility
290 of running the trains?

This question was placed before the jury in many different phases; but it is not clear that the jury, as sensible men, could not have understood the latter portion of subdivision 3 as stating that the conductor of the second train was a vice-principal of the defendant, and that if he was negligent the defendant would be liable.

The instructions and charge of the court must be considered in the light of the evidence. All of the testimony tended to show that the conductor of the second train did not have the exclusive management and control of the train. There was no evidence tending in the slightest degree to show that he did. He was running the train under telegraphic orders, without a schedule or time-card. Neither under the testimony nor under the instructions could the jury have found as a fact that the conductor of the second train was the vice-principal of the defendant, for whose negligent acts it would be responsible. It is manifest that the jury could not have been misled upon this point by the language of the court in the latter part of the charge, in subdivision 3, even if it should be conceded as being technically erroneous.

It is urged that certain portions of the charge are erroneous in this, that the jury were therein authorized to fix the liability upon any employé of the defendant, and did not require that its negligence should be proven against any particular agent. This position is not well taken. All that is said about "some one else" or "whoever else" had reference to the agent of the corporation who had

the care, management, and control of the movements of the
291 trains. Whoever was invested by the corporation to provide for the running of the trains was the vice-principal of the defendant.

These portions of the charge were in accordance with the general principles we have previously announced. There is nothing said in the charge that would justify the jury in fixing the liability of the defendant indiscriminately upon any one of its employés. The jury must necessarily have understood the charge to be that if the particular agent of the defendant who put the second train in motion and who was clothed with the power and authority to control and direct its movements was guilty of negligence in failing to properly provide for the running of the train, and that if he failed to notify the conductor of the train at what stations or places the first train would stop, and that the conductor of the second train obeyed his orders and the rules of the corporation in regard to the running of such trains, then the defendant would be liable. But if the conductor of the second train disobeyed such orders or disregarded the rules of the company as to — manner in which its trains should be run, and the accident was solely caused by his negligence, then it would not be liable.

It was the duty of the defendant when it put the second train in motion to make suitable provision and to exercise ordinary and reasonable care for its safe management to guard against danger or accidents.

This was a positive duty upon the part of the defendant which it owed to its employés, and if this duty was delegated to any particular agent and such agent was negligent in the performance of that duty, his negligence in that respect is the negligence of the defendant.

292 This principle is distinctly announced in the Baugh case, where the court, in speaking of the positive duty which the master owes to his employés, said: "That positive duty does not go to the extent of a guarantee of safety, but it does require that reasonable precautions be taken to secure safety, and it matters not to the employé by whom that safety is secured or the reasonable precautions therefor taken. He has a right to look to the master for the discharge of that duty, and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employé or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. * * * If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master; but if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is liable therefor."

The charge of the court is not in opposition to these views. The proof shows in this case that the conductor of the second train was running it under telegraphic orders, and that he was not notified that the first train, which he was following, would stop at Clyde

spur. It was a question for the jury to determine, whether such action upon the part of the defendant in providing for the running of the second train was the exercise of that ordinary care and prudence which the law demands. If it was not and the collision occurred by reason of the neglect of such duty, then the defendant was liable for the injury which plaintiff received.

293 Sheehan *v.* Railroad Co., 91 N. Y., 332, is in many respects a case directly in point. There the railroad company was prosecuting its business by running its trains over a single-track railway, and through the direction of its superintendent it put a wild train in motion running irregularly, without reference to any schedule or to its regular trains and moving by special orders. The fireman of the regular train was injured, as claimed by him, by reason of the negligence of the agent of defendant in sending certain orders to the conductors of the respective trains. The court, after announcing the general rule that "where the master delegates to another entire control over a branch or circumstance of his business, the person to whom such power is delegated stands in the place of the master as to all duties resting upon him to his servant, and his acts or omissions relative thereto are the acts or omissions of the master himself," held that the trial court did not err in submitting to the jury the question "whether the defendant had omitted the doing of anything which it ought reasonably to have done to prevent the casualty which resulted in the plaintiff's injury."

Patterson, in his work on Railway Accident Law, section 296, speaking of the duty of railways to their servants in the operation of their lines, among other things says: "A railway is not negligent to its servants if it varies from its regular time-table in running its trains, provided that it gives to its servants reasonable notice of any change, which, if unknown to them, may endanger their safety; but where on a single-track line a special train is ordered to

294 run when a regular train is due and, no effort having been made to hold the regular train, a collision ensues and a servant is injured, the railway is liable, for the negligence of its superintendent is its negligence."

The judgment of the circuit court is affirmed with costs.

Endorsed: Filed March 6, 1895. F. D. Monckton, clerk.

295 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers, &c., Plaintiffs in Error,
vs.
NARCISSE POIRIER. } No. 185.

In error to the circuit court of the United States for the district of Washington, eastern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Washington, eastern division, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed, with interest and costs, and the cause is remanded to said circuit court for such execution and further proceedings as may be necessary in accordance with the opinion of this court.

(Endorsed:) Judgment. Filed March 6th, 1895. F. D. Monckton, clerk.

296 In the United States Circuit Court of Appeals, Ninth Judicial Circuit.

NORTHERN PACIFIC RAILROAD Co. and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers of the Northern Pacific Railroad, Plaintiffs in Error,
vs.
NARCISSE POIRIER, Defendant in Error. } Petition for Writ of Error.

To the Honorable Stephen J. Field, associate justice United States Supreme Court:

The above-named plaintiffs in error, The Northern Pacific Railroad Co. and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific railroad, considering themselves aggrieved by the decision and judgment of this court, made and entered on the sixth day of March, A. D. 1895, in the above-entitled action, do*th* attach hereto their assignment of errors as part hereof and pray for a writ of error from said judgment to the United States Supreme Court, and that the said writ and citation issued thereon and a transcript of the record and proceedings herein, upon which said judgment was rendered, duly authenticated, may be sent to said Supreme Court.

Dated this 10th day of April, A. D. 1895.

JNO. R. McBRIDE,
Attorney for Plaintiffs in Error.

297 *Assignment of Errors.*

Upon the record and proceedings in this case the plaintiffs assign the following errors:

First. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred at the trial of this cause in refusing to give to the jury at the close of the testimony the following instruction, to wit:

"In this case there is no evidence that the defendant The Northern Pacific Railroad Company was guilty of any negligence which caused the accident by which plaintiff was injured or which contributed thereto, and that if there was any negligence it was that of the engineer and conductor or one of them of the second train, and such conductor and engineer being fellow-servants of the plaintiff, there would be no liability therefor on the part of the railroad company, and therefore you will return a verdict for the defendants."

For the reason that the testimony in the case supported the facts as claimed to exist by said instruction, and the refusal to give the same was therefore error.

Second. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in giving the following instruction to the jury and each and every part of the same:

298 "Whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety and to guide the operation of dangerous agencies, whether he is conductor on a freight train or a superintendent or the train-dispatcher, or whoever is clothed with that power and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects.

"Now, applying that general principle to this case, if the evidence shows you that the conductor of either one or both of these trains was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion—if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains—they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and the responsibility for the management and operation of the trains, then whoever else did have that responsibility and power would be the one representing the company."

For the reason that there was no testimony in the case to show

that any other person or persons than those operating the extra train were at fault, unless it were the plaintiff himself, and that an instruction which, as did this, authorizes the jury to conclude
299 that some other person connected with the operation of these two trains was responsible was erroneous.

Because, further, the second paragraph of said instruction, inasmuch as it submitted to the jury to find whether the conductor of either of the trains was clothed with an authority to control the movements of the same "without any restriction upon their judgment and discretion," and whether they were charged with the responsibility for accidents that might occur through neglect to observe proper precautions, and in such case allowed the jury to conclude that they represented the employer, and their neglect would fasten the responsibility on the defendants, which is erroneous.

Said instruction is erroneous, further, in authorizing the jury to find that if the conductors of either of the trains mentioned were not occupying the position of agents of the corporation and responsible for the management and operation of the trains, that they might find any one else who was responsible for the accident and thus render the defendant company liable to the plaintiff.

The instruction is objectionable because it would make the defendant liable for the act of the conductor or engineer of the second train to the plaintiff, who is employed on another and different train, which is against law.

It would make the defendant company liable for an injury which might have occurred without the neglect of either the conductor or engineer or any person connected with the running of either of these two trains which collided, and would necessarily make every railroad accident negligence presumably on the part of the
300 company or railroad unless it could be shown that the plaintiff himself was the cause of the accident. Under this instruction, that must necessarily be the result. We claim it is therefore erroneous.

It is further objectionable and error because it does not require that negligence shall be fixed upon any particular person, or even located by the jury at all, for, under this instruction, if some agent of the company was the cause of the accident, the company would necessarily be liable, and if it did not have such agent to be responsible, then it was negligence in not having such agent, which we insist is erroneous.

Third. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in giving to the jury the following instruction:

"Now, it is not charged that there was any negligence in the management of the first train except the negligence of the conductor, and if the conductor was the responsible man in managing that train and he was negligent, the defendants are liable for that."

The same being subject to the error charged in the last specification above.

Fourth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

301 The court erred in its instruction given to the jury in the following words:

"If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings and in the evidence in the case as a special or extra train, called a wild train, running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendant to have one in control of the operation of trains on that road to prevent that train from coming into collision with the regular trains on that road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train or any one else in authority to control the movements of the trains running over that piece of road."

The first error in this instruction is that it submits to the jury that there was a wild train running under special orders as to the time it was to make, where it was to go, and when it should reach the different stations, and it was the duty of the defendants to have some one in control of the operations of trains on that road to prevent the train from coming into collision with the regular trains, because this instruction implied that there was evidence to show that this was a wild train, running under special orders, whereas there was no evidence on that subject and the jury had no right to infer that there was.

302 The testimony showed that this was an extra train, but ample provision was made in the testimony for the running of this extra train by the rules, and the instruction which required that special control should have been shown to free the defendants from the imputations of negligence were unwarranted and erroneous.

And because the instruction in allowing the jury not only to find against the defendant in case the conductor of the second train or the engineer of that train were in fault in regard to the accident, or whether it was the fault of some other person not disclosed by the evidence, whom the jury might consider ought to have control of these trains so as to prevent a collision, it is equally erroneous.

And because the instruction authorized a finding of negligence occasioned by any one of half a dozen persons, and the jury would not be required under such instruction to concur in locating the neglectful instrument or act.

Fifth. The circuit court of appeals erred in sustaining the ruling objected to in the following assignment of error to that court from the district court of the district of Washington, to wit:

The court erred in refusing to give to the jury the following instruction:

"In determining the question of whether the defendant The

Northern Pacific Railroad Company was guilty of negligence in the management of *their* trains or either of them, the jury are instructed that they may consider the rules of the company which have been read in evidence, and that if it appears therefrom that the
303 running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules, then your verdict must be for the defendants."

Because said instruction embodied the law as applicable to the facts of this case, and the defendants were entitled to have the same given to the jury or the equivalent thereof, and the failure so to do was error to their prejudice.

Sixth. The circuit court of appeals erred in affirming the judgment because the same is against law.

JNO. R. McBRIDE,
Attorney for Plaintiffs in Error.

Order.

The foregoing petition having been presented this day, the assignment of errors annexed thereto, and it appearing that the petitioner is entitled to have the same allowed—

It is ordered that a writ of error be, and it is hereby, allowed as prayed.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

Dated this 21st day of May, A. D. 1895.

304 *Bond.*

Know all men by these presents that we, the Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific railroad, as principals, and E. M. Seale and W. M. Shaw, as sureties, are held and firmly bound unto Narcisse Poirier in the full and just sum of five hundred dollars ($500), lawful money of the United States; for the payment of which, well and truly to be made, we and each of us hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this tenth day of April, A. D. 1895.

The condition of the foregoing obligation is such that whereas in the above-entitled court, in an action pending therein between The Northern Pacific Railroad Co. and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad, plaintiffs in error, *vs.* Narcisse Poirier, defendant in error, judgment was on the sixth day of March, A. D. 1895, affirmed in favor of said defendant in error and against said plaintiff- in error for the sum of seven thousand and five hundred dollars ($7,500)

damages, and for — dollars ($—) interest, and for — dollars ($—) costs of suit;

Whereas the said Northern Pacific Railroad Co. and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, have obtained from said court a writ of error to reverse the said judgment in said action,
305 and citation, directed to said defendant in error, citing and admonishing him to appear in the said court, to be holden at Washington city, District of Columbia, on the — day of October, A. D. 1895, has been issued:

Now, therefore, if the said plaintiffs in error, The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, as receivers of said Northern Pacific Railroad Company, shall prosecute their said writ of error to effect and shall pay or cause to be paid all costs which may be awarded against them if they shall fail to make their plea good, then the above obligation shall be null and void; otherwise it shall be and remain in full force and effect.

NORTHERN PACIFIC RAILROAD COMPANY,
By W. O. CHAPMAN,
Its Counsel, Hereunto Duly Authorized.
THOMAS F. OAKES,
HENRY C. PAYNE, AND
HENRY C. ROUSE,
As Receivers of said Northern Pacific Railroad Company,
By W. O. CHAPMAN,
Their Counsel, Hereunto Duly Authorized.
E. M. SEALE.
W. M. SHAW.

Executed as to Northern Pacific Railroad Company and receivers of Northern Pacific Railroad Company in presence of—
W. L. SAHSE.
W. H. HAYDEN.

As to sureties, executed in presence of—
E. J. DYER.
G. W. WOOSTER.

STATE OF WASHINGTON, }
County of Spokane, } *ss:*

E. M. Seale and W. M. Shaw, being first duly sworn, each for himself and not one for the other deposes and says as follows:

I am the person whose name is subscribed to the foregoing instrument as a surety thereon. I state that I reside *at* the
306 county of Spokane, State of Washington; that I am a householder therein, and that I am worth the amount mentioned as the penalty in said bond over and above all my just debts and liabilities and property which is not exempt from execution.

E. M. SEALE.
W. M. SHAW.

Subscribed and sworn to before me this 10th day of Ap'l, A. D. 1895.

[SEAL.] G. W. WOOSTER,
Notary Public in and for the State of Washington,
Residing at Spokane.

I approve of the sufficiency of the sureties to the within bond. May 21st, 1895.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

(Indorsed): Petition for writ of error, assignment of errors, and bond. Filed June 4, 1895. F. D. Monckton, clerk.

307 United States Circuit Court of Appeals for the Ninth Circuit.

NORTHERN PACIFIC RAILROAD COMPANY (a Corporation), Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, Receivers, &c., Plaintiffs in Error,
vs.
NARCISSE POIRIER. } No. 185.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing three hundred and six pages to be a full, true, and correct copy of the printed record and of the assignment of errors and of all proceedings in the above-entitled cause in said circuit court of appeals, and that the same together constitute the return to the annexed writ of error.

Attest my hand and the seal of said circuit court of appeals, at San Francisco, this 7th day of June, A. D. 1895.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

308 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the ninth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, plaintiffs in error, and Narcisse Poirier, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

309 [Endorsed:] D. No. 185. N. P. R. Co. *v.* Poirier. Writ of error. Filed June 4, 1895. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

Service of the within writ of error by copy admitted this 31st day of May, A. D. 1895.

S. C. HYDE,
Att'ys for Defendant in Error.

U. S. Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said circuit court of appeals for the ninth circuit to the Supreme Court of the United States, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

310 UNITED STATES OF AMERICA, *ss:*

To Narcisse Poirier, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why

the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this twenty-first day of May, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

311 [Endorsed:] No. 185. N. P. R. Co. *v.* Poirier. Citation. Filed June 4, 1895. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

Service of the within citation by copy admitted this 31st day of May, A. D. 1895.

S. C. HYDE,
Att'ys for Defendant in Error.

Endorsed on cover: Case No. 15,941. U. S. circuit court of appeals, ninth circuit. Term No., 295. The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, plaintiffs in error, *vs.* Narcisse Poirier. Filed June 29th, 1895.

your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of May, in the year of our Lord one thousand eight hundred and ninety-five.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

309 [Endorsed:] D. No. 185. N. P. R. Co. *v.* Poirier. Writ of error. Filed June 4, 1895. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

Service of the within writ of error by copy admitted this 31st day of May, A. D. 1895.

S. C. HYDE,
Att'ys for Defendant in Error.

U. S. Circuit Court of Appeals for the Ninth Circuit.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said circuit court of appeals for the ninth circuit to the Supreme Court of the United States, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

310 UNITED STATES OF AMERICA, *ss:*

To Narcisse Poirier, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why

the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Stephen J. Field, associate justice of the Supreme Court of the United States, this twenty-first day of May, in the year of our Lord one thousand eight hundred and ninety-five.

STEPHEN J. FIELD,
Associate Justice of the Supreme Court of the United States.

311 [Endorsed:] No. 185. N. P. R. Co. *v.* Poirier. Citation. Filed June 4, 1895. F. D. Monckton, clerk U. S. circuit court of appeals, 9th circuit.

Service of the within citation by copy admitted this 31st day of May, A. D. 1895.

S. C. HYDE,
Att'ys for Defendant in Error.

Endorsed on cover: Case No. 15,941. U. S. circuit court of appeals, ninth circuit. Term No., 295. The Northern Pacific Railroad Company and Thomas F. Oakes, Henry C. Payne, and Henry C. Rouse, receivers of the Northern Pacific Railroad Company, plaintiffs in error, *vs.* Narcisse Poirier. Filed June 29th, 1895.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 295.

THE NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, PLAINTIFFS IN ERROR,

vs.

NARCISSE POIRIER.

BRIEF FOR PLAINTIFFS IN ERROR.

C. W. BUNN,
Of Counsel.

H. M. SMYTH PRINTING COMPANY, ST. PAUL.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

THE NORTHERN PACIFIC RAILROAD COMPANY AND OTHERS, PLAINTIFFS IN ERROR,

vs.

NARCISSE POIRIER.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

This is a writ of error to the United States Court of Appeals for the Ninth Circuit. The action was brought by Narcisse Poirier in a State Court of the State of Washington, and was removed to the Circuit Court of the United States, where the trial resulted in a verdict and judgment in favor of Poirier against the Plaintiffs in Error for $7,500.00. This judgment was affirmed in the Circuit Court of Appeals (the opinion of which Court is in the Record, pp. 151-160), and is here for review.

The Record discloses a bill of exceptions containing all the evidence, but no reference to the testimony in detail is necessary or material. The facts are clearly stated by Jesse I. Allen, a witness for the Defendant in Error. Record, pp. 37 to 50, 107 to 110.

Poirier was brakeman on a freight train of the Company. The train had three brakemen, Poirier being stationed about the middle and Allen on the rear. The train was a regular train running on schedule time, going down a mountain grade in charge of the usual crew under a conductor. At Clyde station, almost immediately after the train stopped, an extra freight following ran into its rear end; Poirier, engaged in his duties and not expecting the collision, was thrown off the train to the ground and injured. He is admitted to be free from any charge of fault on his part.

The negligence which injured Poirier must have been the negligence of (1) the conductor of his own train, or (2) the conductor or engineer of the overtaking train, or (3) of some other servant of the Company controlling the movements of the overtaking train. The collision occurred about midnight. The second train was an extra, or "wild train." Before the collision the two trains were together at Moscow and at Vollmer stations. At Moscow the second train was standing on the track when the first left the station; at Vollmer, where the first stopped ten minutes to drop some cars, the second was on side track a short distance away when the first pulled out of the station. Clyde, where the collision occurred, is about six miles from Vollmer. It is a station at which the regular train stopped, only when it had cars to set out or pick up there. On the night in question it had cars to leave there and stopped as was customary to set them on the side track. *As the train stopped* the rear brakeman saw the headlight of the irregular train coming down the hill behind; he signalled with his lantern to the overtaking train to stop, but the engineer did not see him though he was in plain sight: Record, pp. 40, 45, 47. The lights on the rear of the first train were lighted: Record, p. 108. The overtaking train came in sight around the curve before the first train came to a thorough stop: Record, pp. 44, 47. The second train came down without blowing a whistle or ringing a bell; and, moving four to six miles an hour, collided with the first: Record, same pages.

As said by the Circuit Court of Appeals in its opinion, "The first train had barely come to a full stop when the second train, moving at a speed of about four miles an hour, struck it." * * * This is the admitted fact and demonstrates that the second train was following much too close and that no care of the employes on the first train would have avoided the accident.

Allen the brakeman on rear of first train testified that the extra train was running on telegraphic orders and had no schedule orders or time card: Record, p. 39.

Ressor, conductor of the second train, was not sworn, but it was agreed he would testify that he was given no notice that the first train would stop at Clyde. Record, p. 136.

The following rules of the Company were put in evidence:

Rule 120. A train must not leave a station to follow a passenger train until five (5) minutes after the departure of such passenger train, unless some form of block signal is used. In mountain districts they will not follow first class trains descending, under any circumstances, until such trains are duly reported at the next telegraph station. *Freight trains must not follow each other in descending mountain grades.* * * *

Rule 122. Freight trains following each other must keep not less than ten minutes apart (except in closing up at stations or at meeting and passing points) unless some form of block signal is used.

See Record, p. 138.

The foregoing facts are undisputed and, except as otherwise specified, are from the testimony of witness Allen, who was called for the plaintiff below, and who was the only witness on either side testifying to the material facts of the collision. It seems to us plain beyond controversy, or discussion, that the conductor of the regular freight was free from fault, and that the conductor and engineer of the extra were guilty of plain neglect and violation of rule in following less than a minute behind the regular.

At the close of the evidence counsel for the Plaintiffs in Error asked the court to charge the jury as follows:

"In this case there is no evidence that the defendant, the the Northern Pacific Railroad Company, was guilty of any negligence, which caused the accident by which plaintiff was injured or which contributed thereto; and that if there was any negligence it was that of the engineer and conductor, or one of them, of the second train, and such conductor and engineer being fellow servants of the plaintiff, there would be no liability therefor on the part of the Railroad Company, and therefore you will return a verdict for the defendants." Record, p. 28.

This instruction being refused and an exception taken, counsel for Plaintiffs in Error requested the court to charge the jury as follows:

"If the jury find from the evidence in this case, that the accident which caused the plaintiff's injury was caused by the negligence of the conductor or engineer of the extra train in following the first train too closely, or by running down the grade at too high a rate of speed, or in not keeping the extra train under proper control, or by any other act or neglect of the conductor or

engineer of the extra train, then I instruct you that the defendants are not liable, and that you will return a verdict for the defendants." Record, p. 28.

This instruction was refused and the Plaintiffs in Error excepted. Counsel for Plaintiffs in Error also requested the court to charge as follows:

"In determining the question of whether the defendant, the Northern Pacific Railroad Company, was guilty of negligence in the management of these trains, or either of them, the jury are instructed that they may consider the rules of the Company, which have been read in evidence, and that if it appears therefrom that the running and conduct of this second train was provided for, and that the accident was caused by the engineer or conductor of the second train in disregarding such rules then your verdict must be for the defendants." Record, p. 26.

This request the court refused and the Plaintiffs in Error excepted. Record, p. 26.

The court gave the last instruction in substance down to and including the words "in disregarding such rules," but omitted the clause following those words in the request and substituted

"the defendants would not be liable for the result of the disregard of such rules, *unless it appeared that the conductor of the train, or some one under whose orders he was acting had authority in the special case to deviate from the rules.*" Record, pp. 34, 35.

The court gave to the jury the following instructions, each of which was duly and separately excepted to:

(1). "Whoever is placed by the employer in the position where he has the responsibility and the right and power to supply these means of safety and to guide the operation of dangerous agencies, whether he is a conductor on a freight train or a superintendent, or the train despatcher, or whoever is clothed with that power, and charged with that responsibility, is deemed in law as the representative of the employer, and the employer is responsible for his acts and his neglects."

"Now applying that general principle to this case, if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer. If the conductors were not the agents of the corporation, having the authority and responsibility for the management and operation of the trains,

then whoever else did have that responsibility and power would be the one representing the company."

(2) "Now it is not charged that there was any negligence in the management of the first train, except the negligence of the conductor, and if the conductor was the responsible man in managing that train, and he was negligent, the defendants are liable for that."

(3) "If there is no liability on account of the negligence of the conductor of the first train, then the question remains whether there was any liability by reason of the mismanagement of the second train. This train is described in the pleadings, and in the evidence in the case, as a special or extra train, called a 'wild train,' running under special orders as to the time it was to make, where it was to go and when it should reach the different stations; and it was the duty of the defendant to have some one in control of the operation of trains on that road to prevent that train from coming into collision with the regular trains on the road, and whoever was chargeable with that duty would represent the employer, so that the defendant corporation would be liable if he neglected his duty, whether it be the conductor of the train or any one else in authority to control the movements of the trains running over that piece of road."

ASSIGNMENTS OF ERROR.

The errors are duly assigned: Record, pp. 162 to 165. They are stated in the foregoing statement of exceptions to the charge and to refusals to charge at the trial.

ARGUMENT.

As we have before said, if the Defendant in Error was injured by negligence, such negligence must have been that of either (1) the conductor of his own train, or (2) the conductor or engineer of the overtaking train, or (3) of some other servant of the Company controlling the movements of the overtaking train.

I.

NEGLIGENCE OF HIS OWN CONDUCTOR.

His own conductor was, as to Defendant in Error, a vice principal of the Company under *Chicago, Milwaukee & St. Paul*

Railway Company vs. Ross, 112 U. S., 377, and we may admit that such conductor's negligence would be that of the corporation. But the mere statement of the case shows that there was no evidence to go to a jury of his negligence. The trial court evidently proceeded on the theory that he might have been bound, when he stopped, to send a flagman behind. He certainly was not negligent in any other particular. But he stopped at a station, a regular stopping place for his train when it had cars for that side track. Neither the rules read in evidence, nor any sensible or practical rule of railroading, made it his duty to send out flagmen, except when he was stopped *by accident or obstruction*: Rule 133, Record, p. 136. Moreover, he could rely on other trains observing the rules and coming into stations under control, expecting trains at such stations and prepared to stop. He had the clear right of way and it was the plain duty of the overtaking train to look out for him and keep clear of collision. What is more conclusive still, he had barely stopped when the collision occured. There was no time to send out a flagman. His rear brakeman did all that could have been done to stop the overtaking train; but it was only a few seconds behind and its engineer did not see the lights of the train ahead, or the brakeman's lantern, gave no signal and put on no brakes. Clearly the accident resulted from the neglect of the conductor, or engineer, or both, of the overtaking train.

The Plaintiffs in Error were entitled to an instruction that there was no evidence for the jury to consider of negligence on the part of the conductor of the regular train. But the Court charged, in instruction (2) quoted in the statement of facts, that the jury might find a verdict based on the negligence of the conductor of the regular train, and this charge was excepted to.

II.

NEGLIGENCE OF THE CONDUCTOR, OR ENGINEER, OR BOTH, OF THE SECOND TRAIN.

These employes were fellow servants of the Defendant in Error and for their negligence he could not recover. *Northern Pacific Railroad Co. v. Charless*, 162 U. S. 359; *Northern Pacific Railroad Co. v. Hambly*, 154 U. S., 349. The Plaintiffs in Error asked such instructions and were entitled to have them given. Instead of giving them the court said to the jury under exception, "Whoever is placed by the employer in a position where he has the responsibility and the right and power * * * *to guide the operation of*

dangerous agencies, whether he is a conductor on freight train or a superintendent or train dispatcher, or whoever is clothed with that power and charged with that responsibility is deemed in law as the representative of the employer, and the employer is responsible for his acts and neglects." The idea expressed by this language to the jury was, that *whoever* is put in charge of guiding dangerous agencies is the representative of the master. An engineer, a conductor, a section foreman running a hand car, whoever he is, or whatever he is called, is the master, if he guides or controls dangerous agencies. In the next paragraph also the court told the jury that, if the conductor of either train *was placed there to exercise judgment and discretion, with power to control the movement of his train* he would represent the master and not be a fellow servant. This was also excepted to. The court also (Record, p. 36) charged that it was the *duty of the corporation* to have some one in control of the rear train to prevent its colliding with the first, and that *whoever was charged with that duty* was vice principal of the master. This was excepted to. These charges are directly contrary to the *Charless* and *Hambly* cases, to *B. & O. R. R. Co. v. Baugh*, 149 U. S., 368, and to *Northern Pacific Railroad Co. v. Peterson*, 162 U. S., 346. In each of these cases the employe held to be a fellow servant was charged with the duty of controlling and handling dangerous agencies: A train of cars as conductor in two cases, and engine and tender as engineer in the third, a hand-car as foreman in the other.

The court below has hopelessly confused the subject by holding that it is a duty of the master, which he cannot delegate, (1) to furnish safe appliances and machinery, (2) *to operate them safely*. The latter is no part of the duty a master owes to a servant, beyond this, that he is bound to a duty in selecting fellow workmen, and perhaps in adopting safe and proper rules for the conduct of business. See Mr. Justice Peckham's statement of a master's duties, *Peterson* case, p. 353. After the master has selected a proper machine, selected competent men, and adopted proper rules, he has done all any master can do. The rule exempting him from further legal obligation is perhaps best rested on the public policy of not requiring by law the performance of impossibilities. Having done this much the master is not liable for the act of a servant in running the machine carelessly.

There was no proof in the case that either of the conductors had any power or authority beyond the ordinary power of conductors considered by this court in the cases above cited. The instruction asked by the Plaintiffs in Error in regard to the dis-

obedience of the rules by the engineer and conducter of the second train was correct and should have been given. The qualification added by the court was erroneous. It was error to give the request adding to it "unless it appeared that the conductor of the train, or some one under whose orders he was acting, had authority in the special case to deviate from the rules," because there was absolutely no evidence that the conductor or any one else had authority to deviate from the rules.

III.

NEGLIGENCE OF SOME OTHER SERVANT OF THE COMPANY CONTROLLING THE MOVEMENTS OF THE OVERTAKING TRAIN.

This is made a main point in the case by the trial court and by the Circuit Court of Appeals. The only evidence on which it is based is one sentence in the testimony of witness Allen (Record, p. 39), reading as follows:

"We done our work there (Moscow) and then went on down the hill and they followed with an extra, or wild train, and it was running by telegraphic orders and had no scheduled orders or time card."

Witness does not state how he knew this, and being a brakeman on another train presumptively he had only the same knowledge any one of sense would have, namely: that an extra train without a time card must move by telegraphic orders. No doubt such was the fact in this case. But this evidence, comparatively unimportant as it seems, has been made in this case to do service as proof that the train was running, to use the language of the trial court, Record pp. 35, 36, "*under special orders as to the time it was to make, where it was to go and when it should reach the different stations.*" There is no evidence that such telegraphic orders did in fact, or would naturally, or ordinarily, direct the *time of leaving a station, or the speed of the train, or the time of arrival at any other station.* And there is no evidence that the operator or despatcher giving orders suspended the rules, or ordered the violation of them, which would be as much beyond his proper authority as beyond the power of a conductor. The rules were made to be obeyed, and particularly for the government of train men. They were rules for practical guidance of conductors in the emergencies occuring on the line. They do not involve the

telegraph, and obviously are generally acted on where telegraphing is inappropriate or impossible. They are part of the necessary code of ordinary care which employes are to act on independent of telegraphic orders, and they supplement and control such orders. They are necessarily imperative. There was a plain cause for this collision: violation of rules and carelessness of the conductor and engineer of the rear train. In the face of a real, proximate and plain cause, the jury was told that it might without evidence, against all the presumptions, and by the merest guesswork, go back of that and find some fault or neglect of a train despatcher. This was error.

For these errors we respectfully submit that the judgment should be reversed.

C. W. BUNN,
Of Counsel for Plaintiffs in Error.

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Supreme Court of the United States.

October Term, 1896.
No. 295.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.,
Plaintiffs in Error;

vs.

NARCISSE POIRIER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

S. C. HYDE,
Of Counsel.

The Evening Post Job Printing House, New York.

Supreme Court of the United States,

OCTOBER TERM, 1896.

No. 295.

NORTHERN PACIFIC RAILROAD COMPANY *et al.*,
Plaintiffs in Error,

AGAINST

NARCISSE POIRIER,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement.

Defendant in error was injured by a rear end collision between a freight train and an extra or wild train of the Northern Pacific Railroad Company, one of the plaintiffs in error. In the fourth paragraph of the amended complaint, among other things, it is averred:

> "That said defendant the Northern Pacific Railroad Company was guilty of carelessness and negligence in this, that the conductor of said first train well knew that said second train was following said first train and failed to leave a flagman in the rear of said first train before and at the time said first train

> stopped at said place (Clyde Spur) to hold and stop said second train, as he was in duty bound to do. That the place where said collision occurred was on a mountain grade and the said defendant the Northern Pacific Railroad Company were guilty of carelessness and negligence in allowing said second train to follow the first train closely, and was guilty of carelessness and negligence in running said second train into said first train, whereby the plaintiff was injured as aforesaid " (see Rec., p. 18).

Plaintiffs in error deny their negligence and aver, as an affirmative defense, that the defendant in error's injuries were due to and caused by his contributory negligence and the carelessness and negligence of his fellow-servants (see Rec., p. 15).

The counsel for plaintiffs in error, in their brief in this Court, admit that defendant in error was not guilty of contributory negligence (Brief of Plaintiff in Error, p. 2). There is no proof in the record that the injuries sustained by defendant in error were caused by the carelessness or negligence of his fellow-servants.

The first train was a regular mixed passenger and freight train; the second was what is known as a " wild " train. They were descending a mountain canyon with two and one-half per cent. grade (see Rec. p. 39). On such a grade following passenger trains are required to keep at least five minutes in the rear, regular freight trains ten minutes (see Rec. pp. 137,142). The wild train was not running on schedule orders or time card, but was running upon telegraphic orders of the company (Rec. p. 39).

Jesse I. Allen, testifying upon this point, said:

> " We done our work there (Vollmer station) and went down the grade, and they (meaning the second train) followed with an extra or wild train, and it was running by telegraphic orders and had no schedule orders or time card."

The testimony also shows that Clyde Spur is not a station; trains do not stop there without special or-

ders so to do; the spur is located on a grade and within a quarter of a mile of a curve in the track in a canyon. The conductor of the leading train, upon which defendant in error was a brakeman and received his injuries, notwithstanding he knew of the grade and the curve and that his train was being followed by a wild train, failed and neglected to station a flagman to prevent such an accident as occurred, as required by the rules of the company (see Rec., p. 40).

The rules of the company require the exercise of great precaution of the part of the conductor in placing his flagman and protecting his train.

Rules 134 reads:

> "* * * The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs for the want of any precaution that could have been taken."

Rule 156 reads:

> "* * * It is the duty of the conductor of every train, when the train stops for *any cause*, to immediately protect the rear end of his train as per rule 133. No understanding with the conductor of the following train will relieve you of this duty."

Rule 164 reads:

> "Conductors and engineers * * * must take every precaution for the protection of their trains, even if not provided for by the rules."

The conductor of the first train did not send out his flagman, did not take any steps for the protection of his train, passengers and crew, remained in the caboose until the wild train was within two or three lengths of his own train and within a few seconds of the time of the collision.

The second train was following within a quarter of a mile of the first train (Rec., pp. 40, 45, 46). The trains were running at a rate of from 15 to 18

miles an hour before commencing to stop (see Rec., p. 44). The rear train was running at the rate of four or five miles an hour at the exact time of the collision. The collision occurred within a minute after the first train came to a full stop (see Rec., p. 40).

The company was guilty of negligence in not notifying the conductor of the second train of its orders to the first train to stop at Clyde Spur (see Rec., p. 136). It was also guilty of negligence in giving telegraphic orders to the second train to leave Vollmer when it did leave, and so shortly after the departure of the first train and to follow said first train down said mountain grade so closely. The distance from Vollmer station to Clyde Spur is six miles.

The only questions to be considered relate to the giving, and the refusal to give, certain charges to the jury by the trial Court. The charges complained of are set out in full on pages 3, 4 and 5 of the brief of plaintiffs in error.

POINTS.

I.—The brief of plaintiffs in error does not contain such an assignment of errors as is required by Rule 21 of this Court, and the writ of error should be dismissed and judgment affirmed.

Ober v. *Gallagher*, 93 *U. S.*, 199.

II.—The three instructions quoted on pages three and four of the brief of plaintiffs in error were properly refused by the Court.

There is evidence that the company was guilty of negligence in not informing the conductor of the

second train that the first train would stop at Clyed Spur and in giving the conductor of the second train telegraphic orders to leave Vollmer station in so short a time after the departure of the first train, and in running the second train too closely down the mountain and steep grade and within a minute's run of the preceding train.

The charges were also properly refused for the reason that in them the Court was asked to determine, as a matter of law, that if there was any negligence proven in the case it was the negligence of the engineer and conductor or one of them of the second train.

There is no evidence in the case that the conductor and engineer of the second train were guilty of negligence and there is evidence in the case that the company was guilty of negligance contributing directly to the injury of defendant in error.

The second instruction asked for by plaintiffs in error was properly refused for the reason that plaintiffs in error assumed therein that the conductor and engineer of said second train were entirely responsible for the running of said train too closely to and after the first train. This second or wild train was run on telegraphic orders and the presumption is that the engineer and conductor thereof obeyed and followed the orders given by the company.

Sherman & Redfield on Neligence, 4th Ed., Secs. 58, 59, 60.
Sheehan *v.* R. R. Co., 91 N. Y., 332.
Patterson on Railway Accident Law, Sec. 298.
R. R. Co. *v.* Horst, 93 U. S., 295.
R. R. Co. *v.* Ives, 144 U. S., 408.
R. R. Co. *v.* Novak, 61 Fed. R., 573.

If the conductor and engineer in running said wild train had not obeyed such orders, and the collision was the result of their negligence, the company having these orders in its possession, should have offered them in evidence and made it plain to

the Court and jury that the collision was the result of the negligence of fellow servants of defendant in error, and not that of the company.

Sherman Redfield on Negligence, Sec. 60.

Patterson on Railway Accident Law, Secs. 228, 335, 375. Opinion of Circuit Court of Appeals, Rec., p. 154.

The instruction set out in the fourth page of brief of plaintiffs in error was also properly refused. The general rules put in evidence apply to trains running on schedules and time cards and do not apply to wild trains running under telegraphic orders and not under schedules or time cards. This point is made plain by the testimony of Allen. He says it was a wild train running under telegraphic orders and had no schedule or time card (Rec., p. 39).

The points included in said instruction, in so far as they were applicable to the case, were included in and covered by the general charge of the Court (see Rec., pp. 29-36).

Third. The three instructions given by the Court, taken in connection with the entire charge and read and explained thereby, state the law correctly.

The only other matters complained of are the charges given by the Court, numbers 1, 2 and 3, which are printed in full on pages 4 and 5 of the brief of plaintiffs in error. The exceptions do not point out the particular part of these instructions which the plaintiffs in error complain of. The whole of the instructions are not questioned. The exceptions, therefore, are insufficient.

Rule 21, United States Supreme Court Rules.

Thompson on Trials, Sec. 2397.

Holder *v.* U. S., 150 U. S., 91.

Chateaguy, &c., Co. *v.* Blake, 144 U. S., 476, 488.

Lewis *v.* U. S., 146 U. S., 370.

It is conceded in the brief of plaintiffs in error that the conductor of the first train was not a fel-

low-servant of defendant in error. It necessarily follows, therefore, that if he was guilty of negligence contributing to the injury of defendant in error, as we have shown that he was, through his violation of the rules of the company in neglecting to flag the second train, then the plaintiffs in error are liable therefor.

C. M. & St. P. R. R. Co. *v.* Ross, 112 U. S., 377.

B. & O. R. R. Co. *v.* Baugh, 149 U. S., 368.

The remainder of these three instructions states the law correctly, to wit, that it is the duty of the company to have a superintendent or vice-principal on the road charged with the management and operation of its trains.

The Court, in applying the general rules, as to negligence and care, given in the charge, said:

> "Now, applying that general principle to this case, if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movement of the trains, without any restriction upon their judgment and discretion; if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and charged with responsibility for accidents that might occur through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer."

Ordinarily conductors' judgment and discretion is limited by the rules and regulations of the company. The person who has absolute control of the management of a train or trains of the company without any restrictions by rule, regulation or otherwise, starting, stopping and running them at a rate suiting his own convenience, is necessarily a representative of the company and is a vice-principal. Such

authority may be conferred upon a conductor but is usually conferred upon a superintendent or train dispatcher.

See

Sheehan *v.* R. R. Co., 91 N. Y., 332.
Flike *v.* B. & A. R. R. Co., 53 N. Y., 549.
Paterson's Railway Accident Law, Sec., 228 and 296.

These instructions relate principally to the operation of wild trains under the company's orders, and if the conductor of this wild train was giving the orders, and operating the train without any restrictions or rules, ~~other than such orders,~~ then he was a vice-principal representing the company.

R. R. Co. *v.* Ives, 144 U. S., 417.
R. R. Co. *v.* Herbert, 16 U. S., 642.
R. R. Co. *v.* Ross, 112 U. S., 377.
Opinion of Circuit Court of Appeals, Rec., pp. 157, 160.

We therefore respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

S. C. HYDE,
Of Counsel for Defendant in Error.

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Supreme Court of the United States.

October Term, 1896.
No. 295.

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

THE NORTHERN PACIFIC RAILROAD COMPANY ET AL.,
Plaintiffs in Error,

vs.

NARCISSE POIRIER,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

S. C. HYDE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1896.

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NORTHERN PACIFIC RAILROAD, COMPANY *et al.*,
Plaintiffs in Error,

AGAINST

NARCISSE POIRIER,
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BRIEF ON BEHALF OF DEFENDANT IN ERROR.

Statement.

Defendant in error was injured by a rear end collision between a freight train and an extra or wild train of the Northern Pacific Railroad Company, one of the plaintiffs in error. In the fourth paragraph of the amended complaint, among other things, it is averred:

> "That said defendant the Northern Pacific Railroad Company was guilty of carelessness and negligence in this, that the conductor of said first train well knew that said second train was following said first train and failed to leave a flagman in the rear of said first train before and at the time said first train stopped at said (Clyde Spur) to hold and stop said second train, as he was in duty bound to do. That the place where said collision occurred was on a mountain

> grade and the said defendant The Northern Pacific Railroad Company were guilty of carelessness and negligence in allowing said second train to follow the first train closely, and was guilty of carelessness and negligence in running said second train into said first train, whereby the plaintiff was injured as aforesaid." (See Rec., p. 18.)

Plaintiffs in error deny their negligence and aver, as an affirmative defense, that the defendant in error's injuries were due to and caused by his contributory negligence and the carelessness and negligence of his fellow-servants (see Rec., p. 15).

The counsel for plaintiffs in error, in their brief in this Court, admit that defendant in error was not guilty of contributory negligence (Brief of Plaintiff in Error, p. 2). There is no proof in the record that the injuries sustained by defendant in error were caused by the carelessness or negligence of his fellow-servants.

The first train was a regular mixed passenger and freight train; the second was what is known as a "wild" train. They were descending a mountain cañon with two and one-half per cent. grade (see Rec., p. 39). On such a grade following passenger trains are required to keep at least five minutes in the rear, regular freight trains ten minutes (see Rec., pp. 137, 142). The wild train was not running on schedule orders or time card, but was running upon telegraphic orders of the company (Rec., p. 39).

Jesse I. Allen, testifying upon this point, said:

> "We done our work there (Vollmer station) and went down the grade, and they (meaning the second train) followed with an extra or wild train, and it was running by telegraphic orders and had no schedule orders or time card."

The testimony also shows that Clyde Spur is not a station; trains do not stop there without special orders so to do;

the spur is located on a grade and within a quarter of mile of a curve in the track in a cañon. The conductor of the leading train, upon which defendant in error was a brakeman and received his injuries, notwithstanding he knew of the grade and the curve and that his train was being followed by a wild train, failed and neglected to station a flagman to prevent such an accident as occurred, as required by the rules of the company (see Rec., p. 40).

The rules of the company require the exercise of great precaution on the part of the conductor in placing his flagman and protecting his train.

Rule 134 reads:

> "* * * The conductor must know that his train is fully protected in both directions, and he will be held responsible if any accident occurs for the want of any precaution that could have been taken."

Rule 156 reads:

> "* * * It is the duty of the conductor of every train, when the train stops for *any cause*, to immediately protect the rear end of his train as per rule 133. No understanding with the conductor of the following train will relieve you of this duty."

Rule 164 reads:

> "Conductors and engineers * * * must take every precaution for the protection of their trains, even if not provided for by the rules."

The conductor of the first train did not send out his flagman, did not take any steps for the protection of his train, passengers and crew, remained in the caboose until the wild train was within two or three car-lengths of his own train and within a few seconds of the time of the collision.

The second train was following within a quarter of a mile of the first train (Rec., pp. 40, 45, 46). The trains were running at a rate of from 15 to 18 miles an hour be-

fore commencing to stop (see Rec., p. 44). The rear train was running at the rate of four or five miles an hour at the exact time of the collision. The collision occurred within a minute after the first train came to a full stop (see Rec., p. 40).

The company was guilty of negligence in not notifying the conducter of the second train of its orders to the first train to stop at Clyde Spur (see Rec., p. 136). It was also guilty of negligence in giving telegraphic orders to the second train to leave Vollmer when it did leave, and so shortly after the first train and to follow said first train down said mountain grade so closely. The distance from Vollmer station to Clyde Spur is six miles.

The only questions to be considered relate to the giving, and the refusal to give, certain charges to the jury by the trial Court. The charges complained of are set out in full on pages 3, 4, and 5 of the brief of plaintiffs in error.

POINTS.

I.—The brief of plaintiffs in error does not contain such an assignment of errors as is required by Rule 21 of this Court wherefore the judgment should be affirmed.

Rule 21, United States Surpeme Court rules.

Ober *v.* Gallagher, 93 U. S., 203.

II.—The three instructions quoted on pages three and four of the brief of plaintiffs in error were properly refused by the Court.

There is evidence that the company was guilty of negligence in not informing the conductor of the second train that the first train would stop at Clyde Spur and in giving the conductor of the second train telegraphic orders to leave Vollmer station in so short a time after the

departure of the first train, and in running the second train too closely down the mountain and steep grade and within a minute's run of the preceding train.

The charges were also properly refused for the reason that in them the Court was asked to determine, as a matter of law, that if there were any negligence proven in the case it was the negligence of the engineer and conductor, or one of them, of the second train.

There is no evidence in the case that the conductor and engineer of the second train were guilty of negligence and there is evidence in the case that the company was guilty of negligence contributing directly to the injury of defendant in error.

The second instruction asked for by plaintiffs in error was properly refused for the reason that plaintiffs in error assumed therein that the conductor and engineer of said second train were entirely responsible for the running of said train too closely to and after the first train. This second or wild train was run on telegraphic orders, and the presumption is that the engineer and conductor thereof obeyed and followed the orders given by the company.

If the conductor and engineer in running said wild train had not obeyed such orders, and the collision was the result of their negligence, the company, having these orders in its possession, should have offered them in evidence and made it plain to the Court and jury that the collision was the result of the negligence of fellow servants of defendant in error, and not that of the company.

Sherman & Redfield on Negligence, 4th edition, secs. 58, 59, 60 and cases there cited.

Patterson's Railway Accident Law, Sec. 375, and cases there cited.

Grand Trunk Railway Co. *v.* Ives, 144 U. S., 408–418.

Opinion of Circuit Court of Appeals, this case, Rec., p. 154.

The instruction set out in the fourth page of brief of plaintiffs in error was also properly refused. The general rules put in evidence apply to trains running on schedules and time cards, and do not apply to wild trains running under telegraphic orders and not under schedules or time cards. This point is made plain by the testimony of Allen. He says it was a wild train running under telegraphic orders and had no schedule or time card (Rec., p. 39).

The points included in said instructions, in so far as they were applicable to the case, were included in and covered by the general charge of the Court (see Rec., pp. 29-36).

This instruction, though probably requested, was abandoned by plaintiff in error in the court below. It has not made it part of the record by its bills of exception (see Bills of Exception, pp. 25–26 and 26 to 36) and the judgment should in no case be reversed upon that ground.

Williams *v.* Norris, 12 Wheaton, 117.
Tucker *v.* U. S., 151 U. S., 164–170.

III.—The three instructions given by the Court, taken in connection with the entire charge and read and explained thereby, state the law correctly.

The only other matters complained of are the charges given by the Court, numbers 1, 2 and 3, which are printed in full on pages 4 and 5 of the brief of plaintiffs in error. The exceptions do not point out the particular part of these instructions which the plaintiffs in error complain of. The whole of the instructions are not questioned. The exceptions, therefore, are insufficient.

Rule 21 United States Supreme Court Rules.
Carver *v.* Jackson, 4 Peters, 80.
Spring Company *v.* Edgar, 93 U. S., 645, 658–9.
Mobile & Montgomery Railway Co. *v.* Jurey, 111 U. S., 596–7.

It is conceded in the brief of plaintiffs in error that the conductor of the first train was not a fellow-servant of defendant in error. It necessarily follows, therefore, that if he was guilty of negligence contributing to the injury of defendant in error, as we have shown that he was, through his violation of the rules of the company in neglecting to flag the second train, then the plaintiffs in error are liable therefor.

Chicago, Milwaukee & St. Paul Railway Company *v.* Ross, 112 U. S., 377.

Baltimore and Ohio Railroad Company *v.* Bough, 149 U. S., 368.

Company's Rules 133 and 156, Rec., pp. 136, 137.

The remainder of these three instructions states the law correctly, to wit, that it is the duty of the company to have a superintendent or vice-principal on the road charged with the management and operation of its trains.

The Court, in applying the general rules, as to negligence and care, given in the charge, said:

> "Now, applying that general principle to this case, if the evidence shows you that the conductor of either one or both of those trains was clothed with authority to control the movement of the trains, *without any restriction upon their judgment and discretion;* if they were placed there to exercise judgment and discretion, with power to control the movements of those trains, and *charged with responsibility for accidents that might occur* through neglect to observe proper precautions and use reasonable care in handling the trains, they would represent the employer, and their neglect would fasten the responsibility on the employer."

Ordinarily conductors' judgment and discretion is limited by the rules and regulations of the company. The person who has absolute control of the management of a train or

trains of the company without any restrictions by rule, regulation or otherwise, starting, stopping and running them at a rate suiting his own convenience, is necessarily a representative of the company and is a vice-principal. Such authority may be conferred upon a conductor but is usually conferred upon a superintendent or train dispatcher.

See

C. M. & St. P. Ry. Co. *v.* Ross, 112 U. S., 377.
Wilson *v.* Railroad Co., 48 Fed., 57.
Union P. Co. *v.* Novak, 61 Fed., 583.
Hough *v.* Railway Co., 100 U. S., 214.
Railroad Co. *v.* Herbert, 116 U. S., 642.
Railroad Co. *v.* Baugh, 149 U. S., 368, 386.
Railway Co. *v.* Daniels, 152 U. S., 684.
Company's Rule 128, Rec., p. 137.

These instructions relate principally to the operation of wild trains under the company's orders, and if the conductor of this wild train was giving the orders, and operating the train without any restrictions or rules, then he was a vice-principal representing the company.

See authorities last cited.

The following authorities support the rulings of the circuit court:

R. R. Co. *v.* Cox, 145 U. S., 594.
Opinion of Court of Appeals, Rec., pp. 157 to 160.
Sheehan *v.* R. Co., 91 N. Y., 332.
Filke *v.* R. R. Co., 53 N. Y., 549.
Patterson's Railway Accident Law, Sec. 296.

We therefore respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

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Of Counsel for Defendant in Error.